Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1993

CARROLL LEBLANC, wife of/and
GERALD CONSTANCE AND CLEARY BICYCLE,
MOPED & GO-CART CENTER, INC.,

*Petitioners,*

v.

STATE OF LOUISIANA, THROUGH THE DEPARTMENT
OF TRANSPORTATION AND DEVELOPMENT,

*Respondents.*

**Petition For A Writ Of Certiorari
To The Supreme Court Of Louisiana**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The U.S. Const. amend. V, provides "nor shall private property be taken for public use, without just compensation". The provisions of the Fifth Amendment are applicable to the States, through the U.S. Const. amend. XIV, which also provides the guarantee of "equal protection" under §1. The questions presented here are as follows:

1. Whether the Louisiana Supreme Court correctly held – contrary to its own established rules of vicinage – that the barricading and denial of ingress and egress by the State to an adjoining property owner, during roadway construction and redesign, was not a "taking" triggering the payment of "just compensation".

2. Whether the Louisiana Supreme Court correctly held that the State's action must "rise to the level of excessive or abusive conduct" in order for an adjoining property to receive "just compensation", when the Louisiana Supreme Court has previously enunciated a "damage and causation" test, between two citizens, who are adjoining landowners.

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**Petition For A Writ Of Certiorari**
**To The Supreme Court Of Louisiana**

## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana in this case.

## OPINIONS BELOW

The opinion of the Supreme Court of Louisiana denying Rehearing dated January 6, 1994 is not reported, but it is reprinted in the appendix to this petition at 61a-63a. The opinion of the Supreme Court of Louisiana is

reported at 93-CA-0813 (La. 11/24/93); 626 So.2d 1151. It is reprinted in the appendix to this petition at 1a-24a. The opinion of the Court of Appeal, Fifth Circuit, State of Louisiana is reported at 92-CA-699 (La. App. 5th Cir. 2/25/93) 615 So.2d 365. It is reprinted in the appendix to this petition at 35a-60a. The judgment of the trial court denying the State of Louisiana a new trial is not reported. It is reprinted in the appendix to this petition at 33a-34a. The judgment of the trial court dated December 19, 1991, and the reasons therefor are not reported. It is reprinted in the appendix to this petition at 25a-32a.

## JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on November 24, 1993. A timely petition for rehearing was filed. The application for rehearing is reprinted in the appendix to this petition at 64a-74a. The application for rehearing was denied on January 6, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

## STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V, provides:

" . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, §1, provides:

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

La. Const. art. 1 §3, provides:

"No person shall be denied the equal protection of the laws.

La. Const. art. 1 §4, provides:

"Property shall not be taken or damaged by the State . . . except for public purposes and with just compensation. . . .

La. Const. art. 1 §22, provides:

All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

La. Civ. Code art. 667, provides:

Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.

La. Civ. Code art. 2315, provides:

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

## STATEMENT

This case involves the substantial interference with the free use and enjoyment of the fruits of a business and property by their owners, because of the "inverse condemnation/taking" by the State of Louisiana, through the Department of Transportation and Development (hereafter referred to as "State"). The owners of the property were CARROLL LEBLANC, wife of/and GERALD CONSTANCE, and the business was operated by CLEARY BICYCLE, MOPED AND GO-CART CENTER, INC. (hereinafter referred to as "Constance" and "Cleary", respectively).

On March 24, 1978, "Constance" purchased the property at 3001 Clearview Parkway, and constructed a building, thereon. It is located on the I-10 Service Road, at its intersection with Sanford Street, immediately behind Clearview Shopping Center. "Constance" are the owners of all of the stock in "Cleary".

The State's "taking" took place, in two (2) separate and distinct phases. Each phase has its own peculiarities, but both are the result of a "miscalculation"[1] and the ill-conceived and poorly planned actions by the State. The first phase occurred "during" the actual construction portion of the northbound off-ramp of the westbound I-10. During the first phase, the State and its employees barricaded and signed Petitioners into a "walled off", island existence. Petitioners were stranded from the lifeline of their blood, i.e., customers.

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[1] *Constance, et al. v. State of Louisiana, et al.*, 615 So.2d 365, 373, (La. App., 5th Cir, 1993)

The second phase of condemnation is continual and has happened in the "post construction" period. This phase has substantially deprived Plaintiffs of customer traffic from the southern, eastern and western parts of town. This phase is the result of the redesign of the service road by a barrier that disallows traffic, traveling northbound on Clearview, and it prohibits right turns, onto the Service Road.

The injuries suffered by "Cleary" and "Constance" are peculiar to themselves, because they are and were the only owners and retailers, similarly situated. There were no other retail businesses, who were denied access in either of the two periods under consideration.

This story began with the State's inept evaluation of this area in 1978. The State decided to redesign the traffic pattern of the northbound exit ramp. The State considered this project as a "non-major" action, which did not warrant a "solicitation of views", or an "opportunity for public hearing", or an environmental impact statement (Exhibit D-1 TR 606) (TR 638 113-9).[2] The State "miscalculated"[3] that its design would not alter the "social, economic or environmental conditions". (Exhibit D-1 TR 606).

The State also believed it could get by, without having to expend any money to acquire rights-of-way. This was a time of transition for the State in the development of signing and traffic plans. An engineer with the "State",

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[2] "TR" – refers to the official transcript record in the Record of the Supreme Court of Louisiana.

[3] *Constance*, supra, p. 373.

actually assisted in the drawing of the "signing" plan, which was supposed to have been completed by an outside consultant (TR 632-33 1121-1). However, the "signing" designs were further modified by handwritten sketches of other employees from the State, who were not traffic engineers. Those drawings were attached as Joint Exhibit #1 to the transcript. Those sketches were never made a part of the official construction log on the project. This action damaged property rights of the innocent property owners. The layout of barricading and signs suggested by those sketches, actually performed the "walling-off" of Plaintiffs' property and business.

Plaintiffs' property and business sits "tucked" behind Clearview Shopping Center, as can be seen at appendix 60a, which was attached as Appendix I to the Court of Appeals' decision.[4] Plaintiffs' property and business are completely surrounded by a fence from the shopping center, which depicted by P-4 (20 photographs) (TR 497).

Before this project was conceived, the traffic patterns for access to the property were divided as follows:

a) Traffic traveling from the East on the I-10 (Metairie and New Orleans) exited the ramp northbound on Clearview, and then turned right onto the Service Road to reach the Plaintiffs' building;

b) Traffic traveling from the South (River, Huey P. Long Bridge, Harahan and River Ridge) would travel northbound on Clearview, and then turned right onto the Service Road;

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[4] *Constance*, supra, p. 273.

c) Traffic traveling from the West on I-10 (Kenner and Laplace) was able to exit northbound onto Clearview, and then turned right onto the Service Road;

d) Traffic traveling from the North Lake Pontchartrain, Pontchartrain Gardens and Shores Subdivisions) would travel southbound on Clearview, then turned left across Clearview northbound traffic, just south of Veterans Highway, and onto the Service Road.

Those were the principal means of ingress and egress to and from the Plaintiffs' property and business. Two other approaches were available, however, both were substantial inconveniences. One of the routes was a westbound approach on the Service Road from Causeway Boulevard. The other called for patrons to "meander" through the parking lot of the Shopping Center, to the southside exit on Woodlawn Street; whereupon, they would have to turn right onto Sanford Street.

When the "State" started its project, each and every method of getting to Petitioners' building and business was blocked. Barricades were erected to prevent vehicular access on the Service Road, at its intersection with Clearview (Exhibit 4.1,9,15) (TR 497). Road building and earth moving equipment was stored on the Service Road (Exhibit 4.2,3,4 & 5) (TR 497) between the Clearview entrance to the Service Road and the store. The Service Road was blocked by barricades and road building equipment at the eastside intersection with Sanford Street. (Exhibit 4.7,8,11,12,13 & 14) (TR 497). And last, but not least, the Sanford at Woodlawn Street entrance was barricaded and signed, in such-a-way, to prohibit traffic that

had had to meander through the shopping center parking lot.

There were no other similarly situated stores or neighbors. The only other establishment in the area was a biochemical laboratory across Sanford Street from Plaintiffs' building and business. The laboratory was not a retail operation.

The testimony showed that these conditions were the result of the unofficial signing process by the "State", and they actually existed for the period from August, 1981 through May, 1982. Plaintiffs explained that once construction began, it was a daily "hassle" to move barricades; to erect signs to countermand the street signs; and to meet with highway engineers in an attempt to get them to re-route the traffic. All of these steps were instituted to try and allow customers to get to the building. Some of these extraordinary measures were successful, and some customers were able to run the gauntlet to the store.

Plaintiffs introduced into evidence a "sign-in" sheet (P-5) (TR 498) from customers, who had traversed the "gauntlet" and experienced problems getting to the store. By stipulation of the parties, the deposition of one of the customers, randomly selected from the list, was used to illustrate the problems experienced by all who attempted to get to the store (P-6) (TR 489). Plaintiffs' first knowledge of the conditions came when the construction equipment appeared, and the barricades and signing were erected.

Subsequent to the initial construction phase, the traffic patterns have been substantially altered. Plaintiffs and

their customers have been subjected to more than "ordinary inconvenience or disturbance".[5] They have been substantially deterred from being able to get to the Plaintiffs' building. The building *"remains highly visible* from the Interstate and from Clearview, it is *also true* that the *major artery of connection,* almost directly from Clearview, is now *non-existent."*[6]

Petitioners have outlined the methods of approach which existed prior to the construction and re-design of this area's traffic pattern. Of the four (4) main methods of approaching the building, only one (1) of those methods of approach remains following the redesign. The only remaining access is an approach from the North, driving southbound on Clearview. The approaching traffic has been physically prohibited by an abutment, from turning right onto the Service Road just south of the intersection of Clearview and Veterans Boulevards. (Report of Irvington J. Eppling P-10 (TR 535)). In that report, the real estate appraiser detailed the various methods of ingress and egress, before and after, in the drawings which were illustrated as Exhibit P-10-C.1,2,3,4,5,6,7,8,9. (These are too numerous to attach hereto, but they are a part of the record.)

Plaintiffs testified how their building had been devaluated, and how their business had declined during, and following, the construction periods to such an extent that they still continue to show losses of profits, even today. At the trial in April, 1991, Mr. Constance outlined that in

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[5] *Constance,* supra, p. 373

[6] *Constance,* supra (emphasis by the court)

November of 1990, the re-design caused additional problems for his store, when the State resurfaced Veterans Highway. The intersection at Clearview, was impaired and his sales declined an additional fifty (50%) per cent, from their already low figure.

"Cleary" and "Constance" showed their damages through the testimony of several witnesses, including: the President of "Cleary", a real estate appraiser, and the CPA for "Cleary". The evidence showed that "Cleary" was engaged in the retail bicycle industry. Its market included children's toys and an "upscale" market, specializing in "hi-tech" racing bicycles. In advance of the 1981 Christmas Buying Season, and just before construction, a large amount of inventory had been purchased. The business records, including Profit and Loss Statements and Tax Returns for the years 1979 through 1986, were introduced.

Constance had selected this location, when he experienced problems at a former location involving the redesign of a bridge. "Cleary" had a second store in St. Bernard Parish, that retailed the same items as the Clearview store. The customer base at the Metairie store was from the middle-to-upper income scale, and the St. Bernard clientele had a lower income base (TR 479).

The records and testimony showed a decline in sales during the construction phase from September, 1981, which continued until May of 1982. The decline in sales was the result of the construction, barricade and signing problems. In addition to those problems, the construction and construction equipment obstructed the roadway. This

was depicted in photographs which were attached as Exhibit P-4, in globo. (TR 497).

The testimony related that Metairie's market was middle-to-upper class, and very stable. Conversely, it showed that the St. Bernard store experienced a much lower standard of economy, when a large industrial plant closed, eliminating approximately 3800 jobs. (TR pp. 499-500 lines 18-5).

The evidence demonstrated how sales had dropped at the Metairie location during the year, after the construction began in the area. The sales also declined following the completion of reconstruction. The sales never did rise to the level of the poorer, and more economically, depressed store in St. Bernard. Constance now takes less in salary and rent than he did in 1981, before any of these events took place.

The Petitioners presented the testimony of their independent certified public accountant. He performed a historical and financial analysis of the condition of the business, before preparing tax reports for "Clearly" in 1986. The CPA proved a range of damages for loss of profits from a low point ($48,098.00), to a high point ($382,507.00). The evaluation was performed in a manner that was consistent with acceptable accounting practices. His testimony provided a range of damages that were "reasonably certain". This evidence, proved that the business had, in fact, sustained a loss during the period of time of the construction.

The financial analysis showed a continuing loss, which carried past the point of construction, into the "post construction" phase of the project. The financial

testimony also showed that the regional economy of the Clearview store was better, than the St. Bernard area. In the analysis, the increase in sales and profits at the St. Bernard store, was used as a gauge for the Metairie store. The Metairie location should have accounted for a higher increase in the amount of sales and profit, because of the nature of its economy, so the model was a conservative measure.

The Petitioner submitted the testimony of a noted "expert in the field of real estate appraisement and devaluation of property through expropriation"[7], and a certified member of the American Institute of Real Estate Appraisers, with an M.A.I. Designation. A multi-faceted evaluation of the property was performed, including elements for: market price, leasing arrangements, comparable sales economic evaluation. The evidence showed the decline or a devaluation of property amounted to $55,000.00.

It was noteworthy that both the financial and real estate analysis stopped short of presenting the damages past 1986, because both explained that devaluation past 1983 and 1986 would be difficult to assess. Other economic factors, would not allow them to isolate only the traffic re-routing and reconstruction problems as a causation, because the whole area experienced an economic "downturn" after 1986.

The case was tried in April, 1991, and the trial court rendered its decision on December 19, 1991. The trial court found that the Petitioners suffered damages during

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[7] *Constance*, supra, p. 370

the construction phase of the project, because the State had denied ingress and egress to the business by barricades, signs, road equipment, and the construction itself. The court decreed that the Plaintiffs had suffered damages after the construction was completed, because of the re-design of the roadway. Customers were denied direct access to Plaintiffs' business from the main roadway, Clearview Parkway. The court also found that the inverse condemnation caused a devaluation of the property.

The State then requested a new trial, and a different judge sat as a reviewing Judge.[8] The new judge denied the State's Motion for New Trial, on February 20, 1992. In her judgment, she stated that the "Judgment" and "Reasons for Judgment" rendered by the original judge were "not clearly contrary to the law and evidence". The State appealed the Judgment, and Petitioners answered the appeal of the State to the Court of Appeal, Fifth Circuit for the State of Louisiana. Petitioners requested that the Judgment be modified to increase the amount of damages to adequately compensate both Petitioners.

The Court of Appeal rendered its decision on February 25, 1993, in a unanimous affirmation of the trial court. In its nineteen (19) page decision, the Court discussed the application of all of the Louisiana jurisprudence on expropriation and inverse condemnation. The Court of Appeal found:

> "there was sufficient evidence to prove that Cleary was the *only* retail business in the area to

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[8] The trial judge had been elected to the Court of Appeal, Fifth Circuit, State of Louisiana prior to rendering his Judgment.

> be impacted by the construction and therefore, the damage was *peculiar to plaintiffs*. There were no other properties similarly situated".[9]

The Court also found that the calculation of damages and loss of profits, "calculated by the astute trial court was reasonably supported by the evidence", and "was within his . . . discretion".[10] There was no manifest error in the award of damages, loss of profits and/or attorney fees.

The State of Louisiana applied for writs to the Louisiana Supreme Court. The writs were granted, and the Supreme Court of Louisiana overturned the decisions of the trial court and the appellate court. In its decision, the Supreme Court of Louisiana opined that it was necessary for petitioners to show that the State had acted excessively or abusively, and that the damages were peculiar to petitioners, alone.

In previous decisions, the Louisiana Supreme Court had established the duties between adjoining landowners. In those cases, the Court had espoused the nature of the obligation between ordinary citizens. In *Butler v. Baber*, 529 So.2d 374 (La., 1988), the Supreme Court interpreted LSA La. Civ. Code arts. 667 – 668, dealing with the recovery for violation of the duties of "vicinage" (rights between neighbors). In *Butler*, the

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[9] *Constance*, supra, p. 373 (emphasis by court)

[10] *Constance*, supra, p. 376

Supreme Court "only" required "that damage and causation be proved" in order for the adjoining landowner to recover from his neighbor.[11]

The Louisiana Supreme Court's decision, herein, was the very first instance wherein petitioners were deprived of property "without due process of law". Accordingly, petitioners asserted the constitutional grounds of denial of "equal protection" and "taking without just compensation" for the first time in their Application for Rehearing. It is reprinted in the appendix to this petition at 64a-74a.

The Supreme Court of Louisiana denied Petitioners' application for rehearing on January 6, 1994, without reasons. Petitioners appeal to this Court to overturn the decision of the Supreme Court of Louisiana, because it deprives Petitioners of their property rights that have been established under the United States Constitution, and the jurisprudence and laws of Louisiana.

## REASONS FOR GRANTING WRIT

This case presents important issues under the Fifth Amendment concerning a judicial decision that applies unequal standards involved in the competing rights, obligations and relational interests of adjoining landowners. When the judicial action applies various criteria to judge the actions of the state differently from those of ordinary citizens, then the Court's reasons therefor should be grounded upon sound constitutional principles. Failure

[11] *Butler*, supra, p. 381

to require the State, in the exercise of its police power, to be responsible, like other ordinary citizens and property owners acts as a denial of equal protection.

Justice Holmes denounced this type of deprivation of property when he stated, "the natural tendency of human nature is to extend the qualification more and more until the last private property disappears".[12] These principles have consistently been applied by this Court without regard to the scale,[13] or the complexity.[14]

## ARGUMENT

This Court has wrestled with the question of how far is "to far",[15] under the Fifth Amendment in its jurisprudence. Petitioners request that this Court review this case, because it demonstrates the necessity of avoiding a " 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries' ".[16] For that reason, your Petitioners have set out the facts in their Statement of the Case, because the complete picture is necessary to this case's understanding.

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[12] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 293, 415, 43 S.Ct. 158, 160 (1922)

[13] *Loretto v. Teleprompter Manhattan CATV, Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982)

[14] *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 2893 (1992)

[15] *Lucas*, supra at 112 S.Ct. 2886, 1893

[16] *Lucas*, supra

In 1988, the Louisiana Supreme Court defined the obligations of "vicinage" under LSA-C.C. art. 667.[17] The Louisiana jurisprudence on this article of the Civil Code has been constantly evolving to adapt to the changing nature of society and its particular, twentieth century problems, i.e. pollution,[18] canal improvements,[19] and oyster bed infiltration.[20] The jurisprudence had been always viewed in conjunction with Louisiana's delictual or "fault" concept under LSA-C.C. art. 2315.

In *Butler*, supra, the Court determined that:

> Liability under article 667 has been called strict liability, but strict liability is liability without negligence, not liability without fault. . . . Fault under 667 is the damage done to neighboring property, and relief under 667 requires, therefore, only that damage and causation be proved.[21]

Therefore, the Louisiana Supreme Court defined the standard to be applied between adjacent landowners, when one performs a "work" on his own property that causes damage to his neighbor. Ironically, the concurring opinion in *Butler* by Justice Dennis suggested that an "objective search" be undertaken in each case to take "into account all of the social, moral, economic and other

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[17] *Butler v. Baber*, 87-C-2121 (La. 5/23/88); 529 So.2d 374

[18] *Hilliard v. Shuff*, 260 La. 384, 256 So.2d 127 (1971)

[19] *Chaney v. Travelers Insurance Co.*, 259 La.1, 249 So.2d 181 (1971)

[20] *Butler*, supra.

[21] *Butler*, supra at p. 381

considerations that an objective rule maker would consider in forming a rule to govern the case".[22] Justice Dennis rendered a concurring opinion in this case, which appears to differ from his ruling in *Butler.*

The right to ingress and egress has been established in Louisiana as one of the property rights that the owner of property enjoys, and it is constitutionally protected.[23] However, the Louisiana Supreme Court has adopted a different policy to apply to all "taking" situations, where the State is performing work on its land which interferes with the citizen's enjoyment of their own property. In *State of Louisiana, et al. v. Chambers Investment Co.,*[24] the Supreme Court stated that the State could only be held liable, if there was "the presence of some type of excessive or abusive conduct to hold a landowner responsible under Article 667".[25]

This dichotomous standard that has evolved from the reading of both the *Butler* and *Chambers* cases creates an unequal disparity in judging the competing interests of the State with ordinary citizens. When the Louisiana Supreme Court applied the *Chambers'* principles to the instant case, it disregarded the facts of this particular case, which were found by the trial court and affirmed by

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[22] *Butler,* supra, at p. 382

[23] *Cerniglia v. City of New Orleans,* 234 La. 730, 101 So.2d 218 (1958); *Efurd v. City of Shreveport,* 235 La. 555, 105 So.2d 219 (1958); *Cucurullo v. City of New Orleans,* 229 La. 463, 86 So.2d 103 (1956); *State, Department of Highways v. Strickland,* 290 So.2d 714 (La. App. 1st, 1974)

[24] 91-C-1202 (La. 3/2/92), 595 So.2d 598

[25] p. 605

the Court of Appeal. Furthermore, the Louisiana Supreme Court disregarded its own holding in *Butler*. *Butler* stands for the proposition that the issue to be decided involves: was there damage occasioned by the work of the neighbor, irrespective of any qualifying fault? Since *Butler* defined the relational interests and responsibilities of ordinary citizens, without resorting to the terms "excessive or abusive conduct",[26] shouldn't the State be held to the same standard.

Since the Louisiana Supreme Court has adopted the "abusive, excessive test" to determine whether the State can be held liable in an inverse condemnation situation, the question is now raised whether the actions of the Louisiana Supreme Court have violated the Equal Protection Clauses of the United States and Louisiana Constitutions. If the current case is allowed to stand, it will stand for the proposition that, as far as the State is concerned, when there is no physical damage, then an abuse of ownership must be proven in order to recover.

The principle of compensation for "inverse condemnation" cases has been recognized by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California*, 482 U.S. 302, 107 S.Ct. 2378 (1987). The Court stated at p. 2385:

> The Fifth Amendment, which provides in relevant part that 'private property [shall not] be taken for public use, without just compensation. . . . this provision does not prohibit the taking of private property, but instead places a condition on the exercise of power.

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[26] *Chambers*, supra.

It is important to note that there was no abusive behavior involved in that case, and yet compensation was awarded. The same can be said for the loss of business profits and intangibles. In *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434 (1949), this Court recognized an intangible property right for business in the loss of customers, when the government took the laundry for the war effort.

This Court has historically viewed matters like this one, with the concept that:

> The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, . . . the question necessarily requires a weighing of private and public interest.[27]

It is elementary that the guarantees of our United States Constitution are applicable to the States through the Fourteenth Amendment. Louisiana has a corresponding constitutional provision, i.e., La. Const. art. I §4. The United States guarantees the equal protection of its citizens under the Fourteenth Amendment, §1. Louisiana's equal protection laws are contained in its Constitution, Article 1 §§3 and 22.

Recently, the Louisiana Supreme Court went to great lengths to strike down a statute that created a special exemption for the State, because it violated the State's constitution. In *Chamberlain v. State of Louisiana*, 93-C-0472

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[27] *Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S.Ct. 2138, 2141 (1980)

(La. 9/3/93); 624 S.2d 874, that Court eliminated the State's damage "cap" for personal injury. The Supreme Court discussed the balancing of its Constitution's mandate to eliminate governmental immunity and the jurisprudential abrogation thereof in *Board of Commissioners of the Port of New Orleans v. Splendour Shipping and Enterprise Company,* 273 S.2d 19 (La., 1973).

The Court rationalized that "sovereign immunity" was an outmoded concept that propagated inefficiency. The actions in striking down the immunity would make the State answerable in suit. Therefore, petitioners submit that the adoption of the "abusive and/or excessive" requirement establishes a dangerous regression by creating a different class of responsibility under Article 667, for the State, as opposed to any other property owner in *Butler.*

In adopting the standard established by the Louisiana Supreme Court, in the instant case, it does not assign any valid state purpose. One can only hope that the decision to embark upon this line was not prompted by a "floodgate" argument. If ordinary citizens utilizing the *Butler* test need only prove, in a non-physical invasive action, there is damage and its causation; why isn't the state held to the same standard? Why should the State only be liable if its conduct is abusive or excessive? This distinction is unequal.

Therefore, shouldn't the action of the State be susceptible to the same scrutiny as ordinary citizens. The fact that the state chooses to re-route traffic and barricade businesses based upon improper data should not make them immune because of an arbitrary and less rigorous

standard. However, if they do so, they should compensate the property owners that are affected.

The principles of "equal protection" and "due process" apply to judicial decisions.[28] Therefore, petitioners request that this Court engage in its traditional "ad hoc, factual inquiry".[29]

## CONCLUSION

Gerald Constance, his wife, and his company are the backbone of our country and our economy. They are the "MOM & POP" corner store, the true entrepreneurs. They bought their location, and it enjoyed location and access, which was supposed to be "everything", in Real Estate. Suddenly, the State decided that progress dictated another course for the mainstream of traffic from in front of their store. They were cut off from their customers, and they were left barricaded and "signed off" from the public. Ultimately, they had most of their access taken away, by the redesign of the frontage road. Their sales and profits suffered, and they sought redress through the Courts. They worked hard in their business, and they were told that they suffered no loss, because they didn't close their doors. The trial and appellate court decisions, which were favorable to them, were overturned. How do you explain the favorable, unequal protection for the

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[28] *West v. Louisiana*, 194 U.S. 262, 24 S.Ct. 650 (1904); *In re Converse*, 137 U.S. 624, 11 S.Ct. 191 (1891)

[29] *Lucas*, supra, at p. 2893

State, who had damaged them? There is only one way, grant petitioners' Petition for Writ of Certiorari.

Respectfully submitted:

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## APPENDIX A

## SUPREME COURT OF LOUISIANA

**OCT 28 1993**

*93-CA-0813*

CARROLL LEBLANC, Wife of/and GERALD CONSTANCE AND CLEARY BICYCLE, MOPED & GO-CART CENTER, INC.

versus

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, OFFICE OF HIGHWAYS, PEPPER & ASSOCIATES, INC., T.L. JAMES AND COMPANY, C.A. AND LOUISIANA PAVING, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, PARISH OF JEFFERSON, STATE OF LOUISIANA

CALOGERO, Chief Justice*

P.F.C., W.F.M., P.H., C.D.K., H.T.L.

We consider in this inverse condemnation case whether restricted access to property with accompanying reduction in property value and temporary loss of business income triggers the entitlement to compensable damages. Concluding that it does not, we reverse the decisions of the District Court and the Court of Appeal, which awarded damages and attorney's fees to plaintiffs.

In the late 1970's, the Office of Highways of the Department of Transportation and Development for the State of Louisiana ("DOTD") sought to reconstruct the

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* Watson, J., not on the panel. Rule IV, Part 2, § 3. Ortique dissents and assigns reasons. Dennis J. concurs with reasons.

westbound I-10 exit ramp to Clearview Parkway and the adjoining service road network in Jefferson Parish. Studies indicated that traffic on the ramp was expected to increase from 6,580 to 11,300 vehicles per day between 1978 and 1998. The planned improvements were designed to provide greater storage length between the ramp terminal with Clearview Parkway and the Veterans Boulevard intersection as well as a direct connection from Ramp 20 to the Service Road that parallels I-10 on the north side. In seeking the concurrence of the Federal Highway Administration in the project, the state engineer noted that only a narrow strip of right of way adjacent to the northbound roadway of Clearview Parkway between Veterans Boulevard and the Clearview Parkway Interchange would be required. The engineer recommended that, pursuant to the Federal-Aid Highway Program Manual, the 0.38 mile project, which would not require the displacement of any residences or businesses, be classified as a "nonmajor action."

The DOTD entered into a professional service agreement with Pepper & Associates, Inc. to assist in the preparation of construction drawings and specifications for modifications to the I-10/Clearview Interchange. To perform the construction phase of the project, the DOTD contracted with T. L. James & Co., Inc. and Louisiana Paving Company, Inc. On August 17, 1981, the work order was issued, but construction of the project did not begin until September 1, 1981. Pursuant to the Notice of Final Acceptance recorded in the mortgage records of Jefferson Parish, the project was completed by the contractor and accepted by the DOTD on March 23, 1982, less than seven months after commencement of the work.

Before the project, property near the intersection of Clearview and the Service Road could be reached by four primary approaches, as follows:

1. from the north on Clearview Parkway. A southbound vehicle could turn left, cross Clearview northbound traffic just south of Veterans Boulevard onto the Service Road.

2. from the east on I-10. A vehicle traveling from new Orleans and Metairie would exit the northbound ramp onto Clearview Parkway, proceed north briefly, and turn right onto the Service Road.

3. from the south on Clearview Parkway. A northbound vehicle could turn right onto the Service Road.

4. from the west on I-10. A vehicle traveling from Kenner and LaPlace would take the Clearview-North exit, proceed north on Clearview, and turn right onto the Service Road.

After the redesign of the exit ramp, the approaches to the northeast quadrant of the Clearview Interchange were modified in part, so that just two of the above described approaches were not adversely affected. Although approaches 1 and 2, described above, either remain unchanged or even enhance access to the northeast quadrant, approaches 3 and 4 now require a more circuitous route after the completion of construction. From the south on Clearview Parkway or from the west on I-10 (turning north onto Clearview), a vehicle is prohibited from making a right turn from Clearview onto the Service Road. To reach the northeast quadrant from these approaches then, a driver may either (a) drive north on

Clearview to Veterans, turn right on Veterans, turn right into the shopping center, travel through the shopping center parking lot to Sanford Street, and travel up Sanford to the Service Road; (b) drive north on Clearview to Veterans, turn right on Veterans, turn right on Kingman Street, turn right on Trenton Street, turn right on Woodlawn Avenue, and turn right on Sanford to the Service Road; or (c) drive north on Clearview past Veterans, make a "U" turn, and proceed south to the left-turn lane onto the Service Road.

Plaintiffs, Carroll LeBlanc, wife of/and Gerald Constance ("Constance"), own the land and improvements bearing the municipal address 3001 Clearview Parkway, Metairie, but actually located at the corner of the I-10 Service Road and Sanford Street, within the northeast quadrant of the Clearview Interchange and adjacent to the project. The property, which they lease to the corporate plaintiff, Cleary Bicycle, Moped & Go-Cart Center, Inc. ("Cleary"), was acquired on March 24, 1978 for a purchase price of $50,000.00. Simultaneously, Constance executed a collateral mortgage in the amount of $150,000.00 to secure capital for construction costs. The building was complete by September 1, 1978, when Cleary, a business engaged in the sale and service of bicycles and accessories, both juvenile products and bikes in the $150 to $1,000 range for an up-scale, middle to upper income market, opened at this location.

According to Gerald Constance, who testified as the president of Cleary and as the owner/lessor of the property, the seven months of construction and the permanent re-routing of traffic has resulted in substantial loss of sales to the business as well as a permanent devaluation

of his property. During construction, the location of barricades and re-routing signs limited access to his property, which is located across Sanford Street from a biochemical laboratory and near a radio station. Furthermore, photographs introduced as evidence at the trial reflected the storage of road building and earth moving equipment between the Clearview entrance to the Service Road and the business. As evidence of the effects of construction on the business, a six page list of customers, who experienced difficulty in reaching the bicycle shop during the period of construction, together with the deposition of one of these customers, were offered by plaintiffs. Gerald Constance admitted, however, that, at the beginning of the project, a group of engineers from the Highway Department actually solicited his complaints and took action with regard to both the signing and the barricades.[1] Notwithstanding this effort by the DOTD's agents to relieve the situation, both the signs and the barricades consistently reappeared. Furthermore, plaintiffs contend that, even after the construction phase, the substantial alteration to the traffic patterns in their quadrant of the Clearview Interchange have limited access to their property despite its high visibility from the major connecting artery.

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[1] Although Gerald Constance testified that the Service Road was cut off right at Clearview, where the DOTD's contractors were doing the bulldozing construction, and that Sanford Street was barricaded, he does not allege that the business had to be closed for even one day. Furthermore, Russell Doyle, an engineer for the DOTD, asserted that traffic was never completely blocked and that local traffic was permitted to go through the detours on Sanford Street, in accordance with the DOTD's general custom.

In addition to the testimony of Gerald Constance, the corporation's financial information for the taxable years ending 7/31/80 through 7/31/88 was introduced with analysis by Cleary's accountant employed since 1986 and by a CPA retained by the DOTD to review the information. Although the relevance of figures is contested in terms of the profit and loss analysis, it is undisputed that gross sales during the year of construction (the taxable year ending 7/31/82) of $186,683) were lower than both the immediately preceding year ($223,207) and the immediately following year ($241,055). On the other hand, it is undisputed that Constance received increased income each year during the relevant period, from the taxable year before to the taxable year following construction, August 1, 1980 – July 31, 1983, from salary as president of Cleary ($19,000 to $24,600 to $26,000) and from the rent he received as owner of the property leased to Cleary ($24,000 to $34,300 to $33,400).

Appraisers for Constance and the DOTD also testified concerning the alleged devaluation of the property itself. Both agreed that the highest and best use of the property had not changed. According to the plaintiffs' expert, the property retained its commercial attributes because of its proximity to the shopping center and high visibility "even though it's a little harder to get to." Nevertheless, he maintained that the rental value of the property has been reduced since the income stream is probably affected by the reconstruction of the Interchange and the Service Road. Therefore, relying primarily on the estimated rental differential the property would likely command after the construction of the project,

plaintiffs' appraiser concluded that the loss to the property's value as a result of the changed access was $55,000. Using comparables from sales, the DOTD's expert testified that the improvements, which retained their highest and best use, would have suffered no diminution in value. He agreed, however that the land had been diminished in value, but by only $17,710.

Alleging both the loss of sales and the devaluation of the property, Constance and Cleary filed suit in the 24th Judicial District Court for the Parish of Jefferson on August 2, 1982 against the DOTD as well as those directly involved in the design and construction of the project. T. L. James & Co., Inc. and Louisiana Paving Co., Inc. settled all claims brought by plaintiffs and were dismissed from the lawsuit by order of the court dated December 26, 1989. In a judgment rendered with reasons on December 19, 1991, the trial court found that the plaintiffs proved by a preponderance of the evidence that they suffered both a devaluation of their property value and a loss of sales. Relying on *State, Department of Transportation and Development v. Dietrich*, 555 So. 2d 1355 (La. 1990), an expropriation proceeding rather than a case of inverse condemnation,[2] the trial court concluded that, since economic losses had been suffered by a business, damages

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[2] In *Dietrich*, the DOTD expropriated 43.74 acres of a 365.19 acre tract for construction of Interstate Highway 49. The property owner's slaughterhouse and cattleraising operation sustained economic loss. In compliance with the constitutional mandate that the full extent of the loss be compensated when land is expropriated by the state, this Court permitted an award of damages for economic losses.

must be awarded to fully compensate the owner. Accordingly, the court rendered judgment in favor of Constance and against the DOTD in the sum of $55,000, plus attorney's fees of $10,000, and in favor of Cleary and against the DOTD in the sum of $53,153, plus attorney's fees of $10,000. Defendant's motion for a new trial was denied on February 20, 1992.[3]

The Court of Appeal affirmed the judgment of the trial court in all respects. That court found that the damages suffered by the plaintiff in this case, which were caused by the restriction of access to their property, exceeded the level of ordinary inconvenience and are peculiar to plaintiffs, since Cleary was the only *retail* business in the area to be affected by the construction. Relying on *Dietrich* as well as *State, Department of Transportation and Development v. Pace*, 588 So.2d 145 (La. App. 4th Cir. 1991) (another expropriation case), *Harrington v. Southwestern Electric Power*, 567 So. 2d 731 (La. App. 2d Cir. 1990), (reversed exceptions of no cause of action and no right of action since plaintiff's petition could reasonably be interpreted as claiming that the impairment of access was peculiar to his property) and *Bowden v. State, Department of Transportation and Development*, 556 So. 2d 1343 (La. App. 3d Cir. 1990) (involved a complete, permanent loss of access as a result of highway construction), the Court of Appeal concluded that these damages are compensable. The Court of Appeal also agreed with the trial judge that attorney's fees are authorized in an action

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[3] The hearing on the motion for a new trial was held before Judge Jo Ellen Grant, who had replaced the original trial judge on the bench.

based on inverse condemnation pursuant to La. Rev. Stat. Ann. § 13:5111(A) (West 1991).

Although our state constitution recognizes that every person has the right to acquire, use and dispose of private property, this right is subject to reasonable statutory restrictions and the reasonable exercise of the police power. La. Const. art. I, § 4 (1989). In fact, general interest takes precedence over that of individuals, and any individual must yield any particular property to the community, should it become necessary for the general use. La. Civ. Code Ann. art. 2626 (West 1952). A landowner's right of ownership is also limited by Civil Code articles 667 and 668, which require that he tolerate some inconvenience from the lawful use of a neighbor's land. When the neighboring land is owned by the State, those articles are no less applicable. *State, through the Department of Transportation and Development v. Chambers Investment Co., Inc.*, 595 So. 2d 598, 604 (La. 1992)

While property may be taken or damaged by the state or its political subdivisions for public purposes in the exercise of police power, just compensation is constitutionally required. According to *Chambers*, 595 So. 2d at 602, the change in La. Const. art I, § 4, which required that the owner in every expropriation shall be be compensated for property "taken or damaged . . . to the full extent of his loss," revealed a desire to increase the level and scope of compensation beyond that provided by pre-existing state law.

Furthermore, La. Const. art. I, § 4 and its predecessor article, La. Const. of 1921 art. I, § 2,[4] have been interpreted to support a proceeding by a property owner for a taking or damaging even in the absence of an expropriation action. Despite the legislative failure to provide a procedure to seek redress when property is damaged or taken without the proper exercise of eminent domain, this Court has held that a cause of action must arise out of the self-executing nature of the constitutional command to pay just compensation. *Chambers*, 595 So. 2d at 602; *Reymond v. State, Through the Department of Highways*, 255 La. 425, 231 So. 2d 375, 383 (1970). Such a cause of action is referred to as an inverse condemnation, which is defined in *Reymond* as the "proceeding whereby an owner may seek redress when his property is damaged or taken without the proper exercise of eminent domain." *Id.*

The liability of a public body in such case, however, has been limited "to those instances where there is a physical taking or damage to property or a special damage peculiar to the particular property and not general damage sustained by other property similarly located." *Reymond*, 231 So. 2d at 383. In assessing that special damage, it must be determined "whether that damage is not suffered by those in the general neighborhood – that is, whether the damage is peculiar to the individual who

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[4] La. Const. of 1921 art. I, § 2 provides that "[n]o person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

complains." *Id.* at 384. Therefore, this Court has concluded that damages such as the noise of traffic, a less pleasant view, and a circuitous or more inconvenient route to petitioner's property, even when these factors resulted in an actual diminution of market value of the property, were not in themselves special damages and were not recoverable. The *Reymond* Court found that "[d]amages which cause discomfort, disturbance, inconvenience, and *even sometimes financial loss* as an ordinary and general consequence of public improvements are not compensable, and are considered damnum absque injuria [loss without injury in the legal sense]." *Id.*

Furthermore, it has long been recognized that a public body has the right, under its police power, to divert traffic without subjecting itself to liability. *Ramelli v. City of New Orleans*, 233 La. 291, 96 So. 2d 572, 574 (1957). While recognizing that commercial property owners were inconvenienced by the narrowing of a major traffic artery to construct an overpass and by the diversion of traffic some 3000 feet, the Ramelli Court noted that the inconvenience was common to all property owners within the same vicinity. Accordingly, the Court affirmed the ruling of the trial court that the plaintiffs had sustained a loss without an injury in the legal sense. Similarly, other jurisdictions have concluded that a property owner has no protectable interest in such traffic flow, as opposed to access. William B. Stoebuck, Nontrespassory Takings in Eminent Domain 70 (1977).

Although the *Reymond* decision pre-dated the 1974 Constitution, there is no indication that the Constitution intended to change the distinctions between expropriation and inverse condemnation, as were discussed in

*Reymond*. Thus, the landowner's constitutional right to acquire, use and dispose of private property prohibits the state from physically taking or damaging his property without compensation, even for a public purpose. But, in the absence of a taking or physical damage, general damage sustained by property as a consequence of public improvement, such as some degree of inconvenience, must be suffered and endured by owners of separate tracts for the benefit of the general public. In balancing the interests of the owners of private property and the public welfare, the legislature and the judiciary, as well as the framers of the Louisiana Constitution, have reasonably determined that compensation will be limited to owners of property that has been expropriated, except in limited circumstances. However, this Court in *State, through the Department of Transportation and Development v. Chambers Investment Company, Inc.*, 595 So. 2d 598 (La. 1992), acknowledged the trend in opinions toward the "increasing acceptance of the possibility of takings without physical invasion" and noted that courts have, at least impliedly, recognized "street access, riparian rights, easements and servitudes, restrictive covenants, and lateral support" as forms of property. *Id.* at 601-02.

To consider the taking and damaging of legal property rights,[6] which is admittedly abstract and conceptual,

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[6] With regard to access, a survey of American law indicates that any governmental activity that totally landlocks a parcel is a taking. If the loss of access is less complete, it is suggested that a compensable taking has occurred should there be substantial or unreasonable diminution of access to the road system. Some courts have defined a substantial loss of access as one which renders the land unsuitable for the highest and best use it

the *Chambers* court adopted a three-prong analysis in determining whether a claimant is entitled to eminent domain compensation. In accordance with this analysis, the court must (1) determine if a right with respect to a thing or an object has been affected; (2) if it is determined that property is involved, decide whether the property has been taken or damaged in a constitutional sense; and (3) determine whether the taking or damaging is for public purpose under Article I, § 4. *Id.* at 603. In deciding whether the claimant's right was taken or damaged, Civil Code articles 667 and 668, which impose legal limitations on a landholder's right of ownership, must be considered. While Article 667 prohibits the landowner from exercising his right of ownership in such a way as to cause damage to his neighbors, Article 668 requires that he tolerate certain inconveniences which result from the lawful use of a neighbor's property. *Id.* at 604. The *Chambers* court concluded that, where there is no allegation or evidence of personal injury or physical damage to property, a finding of liability under Article 667 "require[s] proof of the presence of some type of excessive or abusive conduct." *Id.* at 605.

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previously had, and the reasonableness question has turned upon the purpose for which the limitations occurred. A suggested analysis requires that the property right of access be defined as the capacity of an abutting owner to have reasonable ingress and egress and a determination of whether governmental activity has denied it to him. Accordingly, a taking has occurred if a governmental entity diminishes the owner's access to the point where it is no longer reasonable, in which case the owner is entitled to compensation. Stoebuck, *supra* p. 9, at 24-39.

Conceding for the purposes of this case that street access is a private property right that has been affected and that a public purpose is involved, we do not conclude that there has been a taking in the constitutional sense. There is proof neither of physical damage to property nor excessive or abusive conduct by the DOTD. Trial testimony and exhibits indicate that barricades and road signs, designed to redirect traffic into a one-way system to eliminate the possibility of head-on collisions on the Service Road, caused limited access to this property for a period of time which did not exceed seven months. Although access was undoubtedly restricted by the construction itself, as well as the DOTD's concerns about public safety, there is no suggestion that Cleary had to be closed, for even a single day, during this seven month period. In fact, plaintiffs' list of customers, who were inconvenienced by these impediments to access, indicated that access was available, if circuitous. And, there was the testimony of Gerald Constance that engineers from the DOTD both solicited his complaints and remedied them, at least temporarily. Furthermore, the presence of heavy equipment, parked in such manner as to interfere with access, also resulted from actions of the contractors, with whom plaintiffs settled their claims prior to trial. The barricades, the signs, and the parked equipment, which impeded or interfered with access to plaintiffs' property for a period of seven months or less, are precisely the types of disturbance, inconvenience, or even financial loss ordinarily occasioned as a general consequence of such a public improvement. While greater accommodation for the adjacent property owners during construction may have been possible, the actions of the

DOTD did not rise to the level of excessive or abusive conduct which the State's neighboring landowners need not tolerate. There was no taking of plaintiffs' property rights under the *Chambers* analysis.

Furthermore, we cannot conclude that there was "special damage peculiar to the particular property" as is required to assess liability against a public body under the *Reymond* holding.[7] The access to and traffic flow by all of the property in the Northeast quadrant of the Clearview Interchange was restricted by the construction and by the permanent re-routing of traffic by this project. While Cleary may have been the only retail business among its immediate neighbors, it cannot be suggested that the damage is peculiar to Cleary. The loss occasioned by the restricted access for each individual property may vary, but the difference is one of degree only. Since the damage was suffered by those in the general neighborhood, it is not compensable.

Accordingly, we reverse the decisions of the District Court and the Court of Appeal, render judgment in favor of the defendant, the State, through the Department of Transportation and Development, Office of Highways, and dismiss plaintiffs' suit at their cost.

REVERSED AND RENDERED

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[7] According to *Reymond*, "[t]he liability of a public body for property taken or damaged but not included within its actual expropriation activity must be limited to those instances where there is a physical taking or damage to that property or a special damage peculiar to the particular property and not general damage sustained by other property similarly located."

SUPREME COURT OF LOUISIANA

NO. 93-CA-0813
OCT 28 1993

CARROLL LEBLANC, wife of/and
GERALD CONSTANCE AND CLEARY BICYCLE,
MOPED & GO-CART CENTER, INC.

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STATE OF LOUISIANA, THROUGH THE
DEPARTMENT OF TRANSPORTATION AND
DEVELOPMENT, OFFICE OF HIGHWAYS,
PEPPER & ASSOCIATES, INC., T. L. JAMES AND
COMPANY, C. A. AND LOUISIANA PAVING, INC.

ON WRIT CERTIORARI TO THE COURT
OF APPEAL, FIFTH CIRCUIT, PARISH OF
JEFFERSON, STATE OF LOUISIANA

ORTIQUE, Justice, dissenting.

The majority opinion finds without exception that in inverse condemnation cases involving restricted access to property with accompanying reduction in property value and temporary loss of business income, a property owner's entitlement to compensable damages is not triggered. I believe that the scope of the majority's pronouncement is overly broad in view of the facts of this case as well as the jurisprudence. The trial court and the court of appeal found, based upon all the evidence, that plaintiffs were entitled to compensation.

The majority opinion reveals that the expert who testified on behalf of the State admitted that plaintiffs' land had been diminished in value in the approximate amount of $17,710. Slip op. at 5. Yet, the majority finds

that plaintiffs' are not entitled to any compensation. The jurisprudence relief upon by the majority involve circumstances in which there was little or no evidence of monetary loss or property devaluation or other special damage peculiar to the particular property. *State, Through the Department of Transportation and Development,* 595 So.2d 598 (La. 1992) (plaintiff sought recovery based upon inability to develop land as planned due to construction); *Reymond vs. State, Through the Department of Highways,* 231 So.2d 375 (La. 1970) (damage suffered by plaintiff not compensable because damage was general and suffered by other property owners similarly located); *Ramelli vs. City of New Orleans,* 96 So.2d 572 (La. 1957) (no recovery because the inconvenience was common to all property owners within the same vicinity).

The majority is silent as to the results of its review of the record with respect to evidence tending to prove that other property owners in the area suffered similar losses or that the construction had a similar effect upon their property, yet the majority concludes that plaintiffs' damage is not compensable on the basis of its commonality with the damage suffered by all other property owners in the area. The record reflects that plaintiffs' owned the only retail establishment in the immediate area of the construction. The majority cites *Reymond vs. State, Through the Department of Highways, supra,* for the proposition that compensation is not payable unless there is special rather than general damage. Because of plaintiffs' status as the only retail establishment, clearly any damage sustained by their business would be distinguishable from damage sustained by non-retail establishments that

do not depend upon the ingress and egress of the general public for their livelihood.

The majority reverses the judgment of the trial court and the court of appeal without application of the appropriate standard of review. The findings of a lower court should not be disturbed on appeal, unless after a thorough review of the record, an appellate court finds that lower courts were clearly wrong or committed manifest error in reaching a decision. *Rosell vs. ESCO,* 549 So.2d 840 (La. 1989). The majority fails to establish that the lower courts committed manifest error or were clearly wrong in rendering judgment for plaintiffs.

For the reasons assigned, I respectfully dissent.

SUPREME COURT OF LOUISIANA

No. 93-CA-0813
NOV 24 1993

CARROLL LEBLANC, Wife of/and
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LOUISIANA PAVING, INC.

DENNIS, Justice (concurring)

I respectfully concur.

Because the taking and damaging of legal property rights, as opposed to the concrete objects of those rights, is by nature abstract and conceptual and often incompletely understood, there is an uncommon need for a firm framework of analysis. Accordingly, in *State through DOTD v. Chambers Investment Co. Inc.*, 595 So. 2d 598 (La. 1992), this court adopted a three-pronged test for determining whether a claimant is entitled to eminent domain compensation: First, has a person's legal right with respect to a thing been affected? In other words, does he have a recognized species of private property right that has been affected, regardless of whether causes of action may exist on other theories? Second, if so, has this particular property, either a right or a thing, been taken or damaged, in a constitutional sense? Third, and if so, was the taking or damage done for a public purpose under

Article I, § 4 of our state constitution? See A. Yiannopoulos, *Property*, 2 La. Civil Law Treatise § 1 (3rd ed. 1991); W. Stoebuck, Nontrespassory Takings in Eminent Domain, 19-20 (1977).

Initially, the claimants' interest that they contend was adversely affected – access to their commercial establishment – clearly constitutes property within the purview of our eminent domain law. The interest of a property owner in the accessibility of his land by motor vehicular traffic is a property right which cannot be damaged or taken without due process and just compensation. *E.g., State ex rel Gebelin v. Department of Highways*, 200 La. 409, 8 So. 2d 71 (1942); M. Dakin and M. Klein, Eminent Domain in Louisiana, 117-18 (1970). Therefore, it is necessary to proceed to the next prong of the three-pronged test and determine whether this property interest was taken or damaged in the constitutional sense.

It is important to bear in mind that the claimants suffered at most a partial rather than a total loss of access. The rule with respect to a *total loss of access* is now clear. Whatever may have been the prevailing view in the previous century, today there is no doubt that governmental action *completely extinguishing* a land owner's access to the street or highway system amounts to a taking or damagè to property, regardless of whether part of the owner's physical land is actually taken. *State ex rel Gebelin v. Department of Highways, supra;* Dakin, *supra*; Stoebuck, *supra* at 28-34.

It is much less clear, however, what rule should be applied in cases of *partial loss of access.* In this area,the changing concepts of "taking" and "property", and

"police-power" versus "eminent-domain" have resulted in "a jumble of doctrines, lack of uniformity of decisions, and . . . dissimilar treatment of landowners who have suffered similar kinds of harm." Stoebuck, *supra* at 34-35. Nevertheless, there has been increasing judicial reliance on a line of analysis that serves to coherently reconcile most of the recent cases. Under that analysis, the owner of land enjoying access to a public way is recognized as having a property right to have reasonable access to that roadway or to the general system of public roads by means of locomotion that are normal for land situated as his is. Therefore, a taking or damage in the eminent domain sense occurs if some action by an entity having the power of eminent domain diminishes such access to the point that it is no longer "reasonable". Stoebuck, *supra* at 70 and 34-71, as well as authorities cited therein; see also cases discussed by Dakin, *supra* at 121-27 and pocket part at 46-48.

The foregoing analysis rests on Justice Holmes observation that:

> Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain

> the act. So the question depends upon the particular facts.

*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

Applying these precepts to the present case, it appears that the claimants have failed to prove that their property interest was damaged or taken in the constitutional sense. Although the claimants to some extent suffered a loss of direct access to their property, they by no means have been denied reasonable access to most of the ways previously serving the property or to the road system in general. Prior to construction, there were numerous methods of access: (1) From the south-bound lane of Clearview by left turn across the opposite lane to the frontage road leading to the shop; (2) From the north-bound lane of Clearview by right turn onto the frontage road to the property; (3) From I-10, either east-bound or west-bound, off-ramp to north clearview and then right turn onto frontage road to the shop; and (4) two other more circuitous routes: north on Clearview, right on Veterans, through the shopping center parking lot to Sanford Street, to the shop or north on Clearview, right on Veterans, right on Kingman, right on Trenton, right on Woodlawn, right on Sanford to the shop. After the redesign and construction of the Clearview/I-10 interchange the property now may be accessed: (1) From south-bound lane of Clearview by left turn across opposite lane to frontage road, the same as before construction; (2) From north-bound lane of Clearview a right turn onto the frontage road is now prohibited, motorists must proceed by a slightly more circuitous route by continuing north on Clearview across Veterans for about one block,

making a "U" turn and then proceeding south to the left-turn lane onto the frontage road to the Shop; (3) the access from I-10 east-bound takes the Clearview-North exit and proceeds north on Clearview the same as north-bound Clearview traffic – this route is also somewhat more circuitous than before construction; (4) traffic from I-10 west-bound now takes the redesigned exit ramp onto the frontage road and then swings around the triangular block at Trenton and Woodlawn and then back up the frontage road to the bicycle shop; (5) after construction access No. 4 described above, remains exactly as before construction. Clearly, some of the access options have been limited somewhat but not nearly enough that the access to the road system is no longer reasonable. As for the temporary interference with access claim, as the facts alluded to in the majority opinion indicate, there was no taking or damage in the constitutional sense because, considering both the physical and temporal extent of the interference, the loss suffered was not substantial.

Finally, because the claimants failed to prove a taking or damage to their property interest, it is not necessary to consider the final prong of the three-prong test, viz., whether the taking or damage was for a public purpose. Furthermore, it is not necessary to consider two irrelevant questions discussed by the court of appeal and the majority of this court, viz., whether there was special damage peculiar to claimants' property and whether the state made work on its estate causing actionable inconvenience to the claimants under Civil Code articles 667-669. The claimants were not required to show that they sustained special or peculiar damage; their proof of any damage or taking in the constitutional sense would have

sufficed. However, they were unable to prove the only type of constitutional damage seriously contended for, temporary and permanent partial losses of access to their property beyond the magnitude permissible under the police power. Consequently, except for the three-pronged analysis, the discussion of *Chambers* is unnecessary; and *Reymond v. State, Dept. of Highways*, 255 La. 425, 231 So. 2d 375 (1970) is inapposite and mostly obsolete.

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## APPENDIX B

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

P.O. BOX 10
GRETNA, LA 70054

CARROLL LEBLANC WIFE OF & G

VERSUS

ST OF LA THRU THE DEPT OF T

DOCKET NUMBER: 0270071I

To: JEROME VOLK ATTY
3929 FLORIDA AVE
KENNER LA 77065

You are hereby notified that a judgment was signed on the 19 day of DECEMBER, 1991, in the above entitled and numbered cause, and the attached is a true copy of the said judgment.

Issued by the Clerk of Court this 23 day of December, 1991.

/s/ Rosary B. Justice
Deputy Clerk of Court for
John A. Gegenheimer,
Clerk of Court

## APPENDIX C

24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 270-071

DIVISION "N"

CARROLL LEBLANC, et al

versus

STATE OF LOUISIANA, et al

FILED: 12-19-91, 1991 s/ Rosary B. Justice
DEPUTY CLERK

JUDGMENT

This matter came before the court for trial on the merits on the 8th and 9th of April, 1991.

PRESENT: JEROME M. VOLK
Attorney for plaintiffs
Carroll Leblanc wife of/and
Gerald Constance and
Cleary Bicycle, Inc.

JESSE S. GUILLOT
Attorney for defendant
State of Louisiana, Dept. of
Transportation & Development

Considering the law, the evidence and the pleadings:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs, Carroll Leblanc, wife of/and Gerald Constance, and against defendant, State of Louisiana, Department of Transportation and Development, in the amount of $55,000.00, plus

attorneys fees of $10,000.00, and that there be judgment herein in favor of plaintiff, Cleary Bicycle, Inc. and against defendant, State of Louisiana, Department of Transportation and Development, in the amount of $53,153.00, plus attorneys fees of $10,000.00, both with legal interest thereon from the date of judicial demand until paid and for all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that expert witness fees are cast as court costs and set as follows:

a. Irvington Eppling ..... $300.00

b. Anton P. Yrle ..... $400.00

c. Ray Ladouceur ..... $400.00

d. Carr T. Daveell, III ..... $300.00

GRETNA, LOUISIANA, THIS 19th DAY OF DECEMBER, 1991.

/s/ James L. Cannella
JAMES L. CANNELLA,
JUDGE, DIV. "N"

**APPENDIX D**

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 270-071 DIVISION "N"

CARROLL LEBLANC, et al

versus

STATE OF LOUISIANA, et al

FILED: 12-19-91 , 1991 /s/ Rosary B. Justice
DEPUTY CLERK

REASONS FOR JUDGEMENT

STATEMENT OF THE CASE:

An expropriation suit was filed by plaintiffs, Carol LeBlanc, wife of/and Gerald Constance and Cleary Bicycle, Inc., against the State of Louisiana, Department of Transportation and Development.

FINDINGS OF FACT:

Mr. & Mrs. Constance purchased the property at 3001 Clearview Parkway, Metairie, Louisiana in 1978 and constructed the building thereon for a total of $150,000.00. They leased it to the business, plaintiff herein, Cleary Bicycle, Inc., which they also own. The business is located in the northeast quadrant of the Clearview Parkway I-10 intersection. Defendant began a construction project in that quadrant in August 1981 and the construction continued through May 1982. Plaintiffs aver that they suffered damages during the construction phase of the project because their customers were hampered or denied

ingress and egress to the business by barricades, signs, road equipment placement and the construction itself. Plaintiffs further aver that they suffered damages after the construction was completed, and still suffer damages, due to the redesign of the roadway, which denies direct access to plaintiffs' business form the main roadway, Clearview Parkway. Plaintiffs allege there has been a devaluation of the property and a loss of sales resulting from the construction and redesign. Defendant claims there was no loss.

CONCLUSIONS OF LAW:

The Court relies on the recent La. Supreme Court case *State/Dept. of Transportation and Development v. Dietrich,* 555 So.2d 1355 (La. 1990), wherein the Court stated:

> In 1974, the Louisiana Constitution was reworded to provide that an "owner shall be compensated to the full extent of his loss" when land is expropriated by the state. Previously, a landowner could only receive the fair market value and any severance damages for property taken through expropriation. The change permits a landowner to remain in an equivalent financial position to that which he enjoyed before the taking. *State Through Department of Highways v. Bitterwolf,* 415 So.2d 196 (La.1982); *State Through Department of Highways v. Constant,* 369 So.2d 699 (La.1979).
>
> . . . . Where economic losses suffered by a business have been proven, damages for incidental and consequential loss must be awarded to fully

> compensate the owner. Article I, Section 4, provides that the landowner should be compensated for "his loss" not merely the loss of the land. *Constant* decided that full compensation under Article I, Section 4, included restoration of a landowner's business facilities to the condition which existed before the taking.

The Court in *Dietrich* further held:

> Proof of economic loss may be determined by various methods, and it may exceed the market value of the property. However, the method employed for proof of loss must demonstrate by a preponderance of the evidence that an actual loss was sustained by the business because of the taking. . . . a property owner cannot retire for life from the taking of a business. A more reasonable time limit for future economic losses is necessary.

In this case plaintiffs bear the burden of proof and have established, by a preponderance of the evidence, that they suffered both a devaluation of their property value and loss of sales.

The Court relies on the testimony and calculations of plaintiffs' economic expert in finding that plaintiffs suffered a devaluation of their property in the amount of $55,000.00.

In addition, the court finds that plaintiffs have suffered a loss of sales in the amount of $53,153.00. To arrive at this figure the Court relies on the figures of defendant's exhibit 9, as well as the economists testimony. The gross profit category most reliably represents plaintiffs economic status in determining their loss or gain. Gross profit is computed by gross sales minus cost of sales.

The tables below shows the economic activity of plaintiffs' business for the year before the construction (1980-1981), the year during the construction (1981-1982) and the year following the construction (1982-1983). It also shows what the gross profits would have been with a 3.6%[1] increase and the resulting loss plaintiffs' suffered due to the construction. The court also concludes that the reasonable time period of loss is two years.

| Taxable year ending | 7/31/81 | 7/31/82 | 7/31/83 |
|---|---|---|---|
| Gross Sales | $223,207.00 | $186,683.00 | $241,055.00 |
| Costs of Sales | $107,224.00[2] | $107,224.00[2] | $129,026.00 |
| Gross Profit | $115,983.00 | $ 79,459.00 | $112,029.00 |
| Projected 3.6% increase | | $120,158.00 | $124,483.00 |
| Loss of Profits | | ($ 40,699.00) | ($ 12,454.00) |

Accordingly, plaintiffs' economic loss due to the construction and redesign is $53,1530.00. This figure plus the $55,00.00 [sic] devaluation sum brings plaintiffs back to "an equivalent financial position to that which they enjoyed before the taking." *Dietrich,* supra.

---

[1] The court used a 3.6% increase because of the actual experience of plaintiffs at their other store.

[2] The court arrived at the $107,224.00 cost of sales figure by averaging the reported costs of sales for the years 1980-1981 ($141,754.00) and 1981-1982 ($72,694.00), because of the artificial difference caused by the pre-purchase of part of the inventory for 1982 in 1981.

The Court assesses expert witness fees, as follows, and casts them as court costs:

a. Irvington Eppling ..... $300.00

b. Anton P. Yrle ..... $400.00

c. Ray Ladouceur ..... $400.00

d. Carr T. Daveell, III ..... $300.00

The Court also feels that attorneys fees are appropriate in this case and herein sets them in the amount of $20,000.00. The Court considered the amount of legal work involved, the expertise of plaintiff's attorney, his success, and the other criteria set forth by law.

Accordingly, the court renders judgment in favor of Mr. & Mrs. Constance and against defendant in the sum of $55,000.00, plus attorney's fees of $10,000 and in favor of Cleary Bicycle, Inc. and against defendant in the sum of $53,153.00, plus attorney's fees of $10,000, plus legal interest thereon from the date of judicial demand until paid, plus all costs of these proceedings.

GRETNA, LOUISIANA, THIS 19th DAY OF DECEMBER, 1991.

/s/ James L. Cannella
JUDGE
JAMES L. CANNELLA,
DIV. "N"

**APPENDIX E**

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER: 270-071 DIVISION "I"

CARROLL LEBLANC, ET AL

VERSUS

STATE OF LOUISIANA, ET AL

FILED: 2-20-92 /s/ Rosary Justice
DEPUTY CLERK

**********

JUDGMENT AND REASONS

This matter was heard on February 18, 1992 on defendant's Motion for a New Trial. The matter was argued before the Court and taken under advisement.

PRESENT:

Jerome Volk, Jr., attorney for/and plaintiff;

Jessie Guillot, attorney for/and defendant;

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for a New Trial is DENIED.

This Court finds that the previous Judgment and Reasons for Judgment are not clearly contrary to the law and the evidence as is required under La. C.C.P. Art. 1972 (1). Therefore, this Motion is denied.

JUDGMENT READ, RENDERED AND SIGNED at Gretna, Louisiana, this 20th day of February , 1992.

/s/ JO ELLEN GRANT
JUDGE

## APPENDIX F

CARROLL LEBLANC, WIFE OF/ AND GERALD CONSTANCE AND CLEARY BICYCLE, MOPED & GO-CART CENTER, INC.

VERSUS

STATE OF LOUISIANA, THROUGH THE THE [SIC] DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, OFFICE OF HIGHWAYS, PEPPER & ASSOCIATES, INC., T.L. JAMES AND COMPANY, C.A. AND LOUISIANA PAVING, INC.

No. 92-CA-699

COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT PARISH OF JEFFERSON, STATE OF LOUISIANA NO. 270-071 DIVISION "I" HONORABLE JAMES L. CANELLA AND JO ELLEN GRANT, JUDGES

**FRED S. BOWES**
**JUDGE**
**FEB 25, 1993**

Court composed of Judges Fred. S. Bowes, H. Charles Gaudin and Edward A. Dufresne, Jr.

JEROME M. VOLK, JR.
MARK J. ARMATO
DeMartini, LeBlanc, D'Aquila & Volk
3329 Florida Avenue
Kenner, Louisiana 70065
ATTORNEYS FOR PLAINTIFFS/APPELLEES, CARROLL LEBLANC, WIFE OF/AND GERALD CONSTANCE, AND CLEARY BICYCLE, MOPED & GO-CART CENTER, INC.

JESSE S. GUILLOT
1523 Polymnia Street
New Orleans, Louisiana 70130-5243
ATTORNEY FOR DEFENDANT/APPELLANT,
THE STATE OF LOUISIANA, THROUGH THE
DEPARTMENT OF TRANSPORTATION AND
DEVELOPMENT

AFFIRMED.

F.S.B., H.C.G., EAD, Jr.

The State of Louisiana, through the Department of Transportation and Development (hereinafter "DOTD"), appeals a judgment of the district court in favor of plaintiffs, Carroll LeBlanc Constance, wife of/and Gerald Constance, and Cleary Bicycle, Moped and Go-Cart Center, Inc. (hereinafter called "Cleary") in the amount of $108,153.00, plus $20,000.00 in attorney fees, plus expert witness fees. We affirm the judgment (in toto) as explained in a particularly well written and soundly reasoned opinion of the district court, as follows.

## PROCEDURAL FACTS

Mr. and Mrs. Constance and Cleary filed suit in the Twenty-Fourth Judicial District Court for damages and losses sustained due to the redesign and construction of the exit ramp at Clearview northbound. Made defendants were DOTD, Pepper & Associates (engineers who designed construction signing) and contractors T.L. James and Louisiana Paving, Inc. All claims except those against DOTD were dismissed or settled prior to trial. In the suit, plaintiffs claimed that they lost business income and that their building was devalued because of a construction

project and redesigning of the traffic routes at the Clearview Parkway North and Interstate 10 Interchange. Following trial against DOTD, the trial judge determined that plaintiffs proved by a preponderance of the evidence that they suffered both a devaluation of property and a loss of sales. The court determined that the loss of profits due to construction and redesign was $53,153.00, using a "reasonable time period of loss" of two years. It was further determined that the property had a loss of $55,000.00 in value, for a total of $108,153.00. The Court awarded these amounts as damages to plaintiffs, as well as attorney fees of $20,000.00 based on the amount of legal work involved, the expertise of plaintiffs' attorney, his success, and "other criteria set forth by law." Expert witness fees in the amount of $1,400.00 were also assessed against defendants.

DOTD appeals, assigning as error the following:

(1) The trial court committed error when it failed to apply the principle of law that the plaintiff owner is obligated to tolerate certain inconveniences resulting from the lawful use of another neighbor's property.

(2) The trial court was manifestly erroneous in awarding $53,153.00 for loss of profits based on uncorroborated self-serving evidence.

(3) The trial court erred in awarding $55,000.00 for devaluation of property when, by plaintiff's own testimony, the property continued to be equally productive.

(4) The trial court erred in granting attorneys fees not provided by statute or contract.

Appellee answered the appeal averring that the court erred in limiting his recovery to the period of time from August, 1981 through July, 1983.

## EVIDENCE AND TESTIMONY

Mr. and Mrs. Constance purchased the property at 3001 Clearview Parkway, Metairie, Louisiana in 1978 and constructed a commercial building thereon for a total of $150,000.00. Cleary began operations in that location later that same year. In August of 1981, the State, through DOTD, was issued a work order to realign the westbound exit ramp of Interstate 10 to Clearview Parkway northbound, including a direct connection from the ramp to Frontage Road. "Cleary" is located on the I-10 Service Road at its intersection with Sanford Street "tucked" immediately behind Clearview Shopping Center. The property and business are completely surrounded by a fence from the shopping center.

DOTD, in requesting permits from Federal Highway Administration, classified the project in a letter dated March 19, 1979 as a "non major" action which would not substantially alter social, economic, or environmental conditions or essentially change traffic patterns in the area. "The project should have no impact on land use in the area either." Therefore, the DOTD concluded that an opportunity for public hearing would *not* be afforded. There would *not*, the State averred, be displacements of residences or businesses. At that point, DOTD concluded that "only a narrow strip of additional right-of-way will

be required adjacent to the northbound roadway of Clearview Parkway, between Veterans Boulevard and the Clearview interchange."

By the time the project actually began in 1981, Cleary had been in operation for several years. There is apparently also a radio broadcasting station and a medical testing laboratory in the area, but no other retail businesses dependent upon customer access like the plaintiffs are. Constance testified that he knew nothing of the project until he noticed the surveyors in front of his store and upon questioning them, learned of the situation. Construction actually began on September 1, 1981.

Prior to construction, there were four principal methods of access to "Cleary":

(1) From I-10 from the East (Metairie and New Orleans) traffic could exit at Clearview north and turn right onto Frontage Road, then directly into the "Cleary" parking lot;

(2) From the South, traffic going north on Clearview would turn right onto Frontage Road;

(3) Westerly traffic from Kenner was able to exit northbound on the Clearview exit and turn right onto Frontage; and

(4) Traffic from the North from Pontchartrain Lake was able to proceed southbound on Clearview and turn left across Clearview just south of Veterans Boulevard onto Frontage Road.

Two other, but more circuitous, routes through the Clearview Shopping Center to an exit on Woodland, then

on to Sanford; and Frontage Road from Causeway were also available.

There was testimony from Russell Doyle, formerly a project engineer of DOTD, that at the beginning of construction, Frontage Road was originally changed to one-way traffic going in an easterly direction, but that motorists ignored the one-way signs and therefore, the road was finally blocked on Sanford at some distance beyond the bicycle shop. He further testified that according to his log books, "local traffic" was permitted to go through the "detours." However, Mr. Doyle agreed that his log books had no specific entries regarding the actual placing of signs by DOTD on the project in question.[1] Aswah Lam, a traffic engineer at DOTD, testified that he reviewed the sign plan prepared by a consultant hired by DOTD (Pepper and Associates) for approval. According to his testimony, economic impact is considered in such traffic engineering and local traffic is to be allowed during such projects. However, Mr. Lam had nothing to do with the actual placing of the signs either and did not testify regarding the sign plan actually employed at these intersections.

Lloyd Gautreaux was the district traffic operations engineer for DOTD in 1981 and 1982. He testified, as did Mr. Russell, that motorists ignored the one-way signs on Frontage Road, and as a result, a barricade was placed in the roadway just beyond Kingman Street (westbound);

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[1] There was a joint stipulation that several signs were actually added to the project which did not appear on the design plans drawn by the state, although the additional signs were put in at the request of Mr. Doyle.

barricades were also placed in the southbound roadway off Woodlawn and in the westbound lane of Sanford. This was supposed to redirect traffic into a one-way system which would eliminate the possibility of head-on collisions on Frontage Road. While the barricades were supposed to have been placed in one lane only, the department deleted any "Local Traffic Only" signs. Referring to Clearview Shopping Center motorists, Gautreaux stated:

> . . . there's a lot of motorists coming out of the Sears' shopping center that are not local traffic in the sense, that the only reason there is that they're at the shopping center and most of them are looking to go to Clearview Parkway. So, we didn't want to give them the idea that perhaps they could get through by going up Sanford and cutting over to the Clearview Parkway so we deleted those signs and we left the left lane open and available for workers that had to get to work.

According to Mr. Gautreaux, during Phase I of the construction, primary access to Frontage was from Clearview; in Phase II, Frontage was closed at Clearview, and local traffic signs could be restored on Frontage. There were no DOTD records, however, to indicate the actual signs which appeared in Phase II.

Mr. Constance testified that Frontage was barricaded at Clearview and also near Woodlawn; additionally barricaded was Sanford near Woodlawn, (Sanford leads to plaintiffs' property from Woodlawn). See Appendix I. Photographs entered into evidence depicted barricades and heavy equipment right off Clearview on Frontage Road just before plaintiffs' building.

Constance stated that even before any signs were placed the heavy equipment was left on the road; and further while the pictures were not taken until January of 1982, that the pictures represent the types and placement of barricades that began to impact his business in September of 1981. Constance stated that six engineers came into his store in the very beginning and asked if there was a problem. Constance explained the sign and barricade problem and they agreed to take care of it. According to Constance (and there was no evidence to refute this) they did take care of the problem, only to have the signs and barricades reappear again the next day. The major signs of which he complained were on Sanford; photographs depicted "Do Not Enter" signs and a barricade with a "Road Closed" sign. Plaintiff verified there were never any "local traffic" signs. During construction plaintiff would place a poster on the barricade to alert potential customers that they could come around, but it was removed numerous times. On weekends he would move the barricade, but unless he took these steps on a daily basis, he would not have any customers. According to Constance, the barricades, as placed, either completely blocking or straddling both lanes cut off access to his store completely during construction.

With regard to damages, Constance testified that the peak period of his business is the last quarter of each year when people begin to make Christmas purchases. He had purchased his Christmas inventory prior to September 1st, the beginning of (and therefore his knowledge of) the construction. In addition, he and his wife are also the stockholders of Cleary East, a bicycle store located in St. Bernard Parish.

Constance owns the bicycle shop personally and leases it to Cleary, with the rental amount figuring the rent by the square foot. Cleary also pays a salary to Constance. Constance testified that even though the economy in St. Bernard is middle to lower income, when Kaiser shut down in 1982, the economy there began to struggle severely; while the Metairie economy is more middle to upper class and stable. Nevertheless, in St. Bernard the sales pattern maintained a steady (if small) growth whereas the Metairie store sales fluctuated greatly. Constance stated that customers continue to the present day to complain about access to the store – that it is easy to see but difficult to actually get to. He estimated that the current design of the road, not being able to turn right on the service road, as previously, eliminated 50% of the access to the store.

Anton Yrle, a certified public accountant, was the accountant for "Cleary" since 1986. Although not employed by Cleary in 1981, he had access to the prior records. He determined the average sales prior to construction and based on a normal 3.6% increase in such sales determined that the Cleary store in Metairie lost business. The 3.6% figure was used because Cleary East experienced that percentage of growth during the same year. Yrle determined that there was a loss of gross sales from 1981 through 1986 of $852,578.00. On this study he used the fiscal year ending July, 1980 as a base year because going back two years "would be a good indication of what the store was doing." At the request of counsel for the state, and the direction of the court, Yrle prepared a report using the fiscal year ending in 1981 as the base year. At that point he determined lost gross

profit from fiscal 1982-1986 to be $48,098.00. Other calculations were made by Yrle using different base years with results ranging from $154,587.00 to $376,191.00.

Ray Ladouceur, testifying for the defendant, used the income tax returns provided by Cleary for his computations. He determined that while sales did decrease during construction there was an increase in net profit in 1982 and 1981. He concluded that gross profit percentage also increased in fiscal 1982. Mr. Ladouceur used certain adjustments for increases in rental payments from Cleary and salary increases to Constance and finally for increased advertising costs in determining that there was no loss of profits but that there was, in fact, an actual gain.

Irving Eppling, recognized as an expert in the field of real estate appraisement and devaluation of property through expropriation, testified on behalf of Constance. Using two approaches, he determined that the loss of value to the building based on potential sales as a rental loss was $63,107.00; the loss of rental value of the building because the construction was approximately $50,000.00; and Eppling, splitting the indications, estimated the loss of real estate value at $55,000.00. He stated that prior to the construction the building had good access, but that afterward, direct access from Clearview and the Interstate access was lost, basically leaving the more circuitous routes described hereinabove. In his opinion, access was definitely *permanently changed adversely*. Mr. Eppling used data from 1980 through 1983, because, in his opinion, 1984 losses in real estate values also became attributable to a declining economy in general.

Carl Dowell was qualified as an expert real estate appraiser for DOTD. Using *only* a method of *comparable sales* in the immediate vicinity, he determined the diminution in value to be $17,710.00. Mr. Dowell agreed that the construction, while it did not deny access, made it "circuitous in terms of getting to the property"; however, he made an appraisal *without* considering the *alteration* of access.

## ANALYSIS

> Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner[,] * * * [who] shall be compensated to the full extent of his loss.
>
> La. Const. 1974, Art. 1, Section 4.

> In 1974, the Louisiana Constitution was reworded to provide that an 'owner shall be compensated to the full extent of his loss' when land is expropriated by the state. Previously, a landowner could only receive the fair market value and any severance damages for property taken through expropriation. The change permits a landowner to remain in an equivalent financial position to that which he enjoyed before the taking. *State Through Department of Highways v. Bitterwolf*, 415 So.2d 196 (La.1982); *State Through Department of Highways v. Constant*, 369 So.2d 699 (La.1979).
>
> *State, DOTD v. Dietrich*, 555 So.2d 1355 (La.1990); also *Dept. of Transp. & Dev. v. Traina*, 537 So.2d 792 (La.App. 2 Cir.1989).

A taking or damaging of property can occur from the official act of expropriating a whole or

partial tract of land or from inverse condemnation, which is when property is taken or damaged without the proper exercise of eminent domain. *Reymond v. State, Department of Highways,* 231 So.2d 375 (La.1970).

In inverse condemnation, the damage may occur not only to property which is physically invaded, but also to a separate and independent tract of land. *Gulf States Utilities Company v. Comeaux,* 182 So.2d 187 (La.App. 3 Cir.1966), quoted with approval in *State, Department of Highways v. Garrick,* 256 So.2d 111 (La.1971). However, when the damage is claimed to a parcel separate from that which is actually taken, the public body's liability is limited to special damages which peculiarly affect that property and which are not sustained by the neighborhood generally. *Garrick, supra; Comeaux, supra; see also, Ursin v. New Orleans Aviation Board,* 506 So.2d 947 (La.App. 5 Cir.1987) rev'd on other grds., 515 So.2d 1087; *Bowden v. State, Dept. of Transp. & Dev.,* 556 So.2d 1343 (La.App. 3 Cir. 1990) *writ denied,* 563 So.2d 879; *Harrington v. Southwestern Electric Power,* 567 So.2d 731 (La.App. 2 Cir.1990).

*Parish of Jefferson v. Tassin,* 594 So.2d 525 (La.App. 5 Cir.1992).

In an expropriation case the defendant has the burden of proving his claim to a legal certainty and by a reasonable preponderance of the evidence; speculation, conjecture, mere possibility and even unsupported probability are not sufficient to support a judgment. R.S. 48:453; *State Dept. of Trans. & Dev. v. Estate of Clark,* 432 So.2d 405, 408 (La.App. 1st Cir.1983) citing *State v. Levy,* 242 La. 259, 136 So.2d 35, 43 (1961). If a

public authority substantially interferes with the owner's right of access, he has a constitutional right to just compensation for his loss; but where access is not substantially impaired or is impaired only on a temporary basis and/or the inconvenience to the owner is not peculiar to him, but general to the public at large, no recovery is allowed.

*State, DOTD v. Pace,* 588 So.2d 145 (La.App. 4 Cir.1991).

The owner of land abutting a public roadway has a property right to access that roadway. A public authority's substantial interference with this right of access gives a landowner a cause of action pursuant to LSA-Const. Art. 1, Section 4 for just compensation. *State ex rel. Gebelin v. Department of Highways,* 200 La. 409, 8 So.2d 71 (1942); *Mills v. State Department of Highways,* 416 So.2d 957 (La.App. 2d Cir.1982), writ denied, 420 So.2d 173 (La.1982); *Dickie's Sportsman's Centers, Inc. v. Department of Transportation and Development, supra.* In addition to the requirement that the impairment of access must be substantial, a plaintiff must show that this impairment is peculiar to his property and not sustained by the public generally.

*Harrington v. Southwestern Elec. Power,* 567 So.2d 731 (La.App. 2 Cir.1990).

The law pertinent to damages resulting to property absent an actual taking is set forth in *Department of Highways v. Capone,* 298 So.2d 94, as follows:

> Our jurisprudence is settled to the effect that, even absent an actual taking,

damages resulting to property from the construction of public improvements are compensable when such damages are special or peculiar to one's property in particular, and are not general damages sustained by other properties similarly situated. *Reymond v. State, Through the Department of Highways,* 255 La. 425, 231 So.2d 375 (1970), and authorities therein cited.

When there is no taking, damages which merely cause disturbance, inconvenience or discomfort, and which are an ordinary and general result of a public improvement, are not compensable, but are held to be damnum absque, injuria. Reymond, above.

In the absence of taking substantial impairment of ingress, when special and peculiar to claimant's property, entitles an owner to compensation. *Efurd v. City of Shreveport,* 235 La. 555, 105 So.2d 219, *Patin, et al. v. City of New Orleans, et al.,* 223 La. 703, 66 So.2d 616; *Harrison v. Louisiana Highway Commission,* 202 So.2d 345, 11 So.2d 612.

* * *

In *Hebert v. State, Dept. of Hwys.,* 238 So.2d 372, 375 (La.App. 3d Cir.), writ denied, 256 La. 911, 240 So.2d 373 (1970), this court stated that there is *special* damage to property where the highway in front of property is discontinued or obstructed so that access to the property is made impossible. See also, *Efurd v. City of Shreveport,* 235 La. 555, 105 So.2d 219 (1985); *Cucurullo v. City of New Orleans,* 229 La. 463, 86 So.2d 103

(1956); *State, DOTD v. Semp Russ Plantations*, 529 So.2d 487 (La.App. 3d Cir.1988).

*Bowden v. State, Dept. of Transp. & Dev.*, 556 So.2d 1343 (La.App. 3 Cir.1990), *writ denied* ___ So.2d ___ (La. ___).

[The name of the circuits and the date of the citation were not given in the quoted material and were therefore left off here as these are exact quotes.]

The State cites *Reymond v. State, Department of Highways*, 231 So.2d 375 (La.1970) and *State Through DOTD v. Chambers Inv. Co.*, 595 So.2d 598 (La.1992) for the proposition that under LSA-C.C. art. 668, the State's construction activities resulted in "inconveniences" which must be tolerated. The codal articles read as follows:

Art. 667 Limitations on Use of Property.

Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.

Art. 668. Inconvenience to Neighbor.

Although one be not a liberty make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should

> darken the lights of his neighbors's [neighbor's] house, because this act occasions only an inconvenience, but not a real damage.

In *Chambers*, supra, the court stated:

> We are not prepared to say that, in all cases, a landowner must prove an abuse of right of ownership before he may supress or recover for a violation of Article 667 by a neighbor. But we think that in a case, such as the present one, in which there is no allegation or evidence of personal injury or physically damage to property, it is consistent with the principles of the Civil Code and our jurisprudence to require proof of the presence of some type of excessive or abusive conduct to hold landowner responsible under Article 667.
>
> Thus, the limitations established by Article 667 upon the State's use and enjoyment of its land, and the requirements imposed by Article 668 on the claimant to tolerate some inconvenience, also serve to mark the boundaries of each party's respective right to develop its land. Because the claimant's right to enjoy its property is not absolute but extends only as far as the law allows it, La.C.C. art. 667-669, unless the obligations and limitations of neighborhood are violated, the property rights of the claimant have not been violated. In other words, as long as the activities on the State's land do not exceed the level of causing the claimant 'some inconvenience,' there can be no taking or damaging of the claimant's property right.

*Reymond*, supra and *Chambers*, supra require that the landowner must prove the construction by the State amounts to more than an "inconvenience" and enters the

realm of "damages." The court in *Chambers*, supra, decided that delay of development of Chambers' property were not recoverable damages, but merely an inconvenience to be tolerated under LSA-C.C. art. 668. The above quoted jurisprudence, most notably *Dietrich*, supra, *Pace*, supra, *Harrington*, supra, and *Bowden*, supra, make it clear that damages, such as those suffered by the plaintiff in the present case, *are compensable*, exceeding the level of inconvenience.

Additionally, it should be noted that the evidence produced at trial indicates that the State may well have engaged in some abuse of conduct in failing to take plaintiffs' position in business into consideration, and failing to adequately provide for it afterward.

Here we take cognizance of the letter from the State referred to previously which stated that no public hearing was necessary, that the project should have *no* impact on land use in the area, and that traffic patterns in the area would not be essentially altered. Clearly, this was a miscalculation on the part of DOTD. Further, it appears from the testimony that while DOTD may have intended to attempt to allow some limited local traffic, such signs were either never utilized or were put up for very limited periods of time. While the concerns of DOTD are clearly beneficent, it appears to this Court that *traffic could have been re-routed* by DOTD in a way so as to lessen the impact on plaintiff's business while still protecting the public at large.

Applying all the applicable law and jurisprudence to the present case, we find no error in the determination by

the trial court that plaintiff suffered compensable damages. There was sufficient evidence to prove that Cleary was the *only* retail business in the area to be impacted by the construction and therefore, the damage was *peculiar to plaintiffs*. There were no other properties similarly situated.

Further, it is clear that during the period of construction, access to plaintiffs' property was severely restricted, and since the completion of the project, access continues to be substantially impaired. The damages go beyond ordinary inconvenience or disturbance, and while access is obviously not impossible, it is far more difficult to get to Cleary following construction. While it is true that the property *remains highly visible* from the Interstate and from Clearview, it is *also true* that the *major artery of connection*, almost directly from Clearview, is now *nonexistent*. Under the law cited and the circumstances of the case, the court properly awarded damages in favor of plaintiffs.

With reference to the amount of damages we hold that the law as espoused by Louisiana courts, including this Court is as follows:

> The measure of damages in expropriation cases is the market value of the land taken plus severance damages to the remainder,if any. *State, DOTD v. Crawford Business Trusts*, 538 So.2d 1078 (La.App. 3 Cir.1989), *writ denied*, 542 So.2d 1381 (La.1989). In calculating severance damages, the court must analyze the diminution in the market and rental value of the property immediately before and immediately after the taking. The same analysis is used to determine

the damages in an inverse condemnation case. *See Reymond, supra; Bowden, supra.*

*Tassin,* supra.

In *Dietrich,* supra, cited by the trial court, our Supreme Court stated thusly:

> Article I, Section 4, does not specify how to fully compensate a landowner whose property is taken. Delegates to the Constitutional Convention explained that full compensation should include moving costs, costs to relocate, inconvenience, and loss of profits from takings of business premises. Where economic losses suffered by a business have been proven, damages for incidental and consequential loss must be awarded to fully compensate the owner. Article I, Section 4, provides that the landowner should be compensated for 'his loss' not merely the loss of the land.
>
> *Constant* decided that full compensation under Article I, Section 4, included restoration of a landowner's business facilities to the condition which existed before the taking. Replacement of property which was proven to be unique and indispensable was held to be an appropriate remedy in *Constant.*
>
> . . . Proof of economic loss may be determined by various methods, and it may exceed the market value of the property. However, the method employed for proof of loss must demonstrate by a preponderance of the evidence that an actual loss was sustained by the business because of the taking. In addition, the award may reflect the economic effect of protracted judicial proceedings. *Constant.*

> Where an expert's well-reasoned testimony supports an award of damages, where it is uncontradicted and, *particularly, where it is accepted by the trier of fact,* the property owners should prevail. *City of Shreveport v. Standard Printing Co.,* 441 So.2d 737 (La.1983).
>
> [Emphasis supplied].

Here, the trial court accepted and relied on the testimony and calculations of plaintiffs' economic expert in finding the devaluation of property to be in the amount of $55,000,00 [sic]. While Mr. Dowells' appraisal reached a different figure we find that the testimony of Mr. Eppling was particularly well-reasoned and gave a more rounded picture of the real estate value of plaintiff's property both before and after construction.

We find no abuse of discretion and no manifest error in the acceptance of this expert and his testimony by the trial court (which is, in any case, not absolutely bound by the opinion of any expert).

> The settled jurisprudence is that expert testimony is to be weighed by the trier of fact in the same manner as other evidence.
>
> *Williams v. Anderson,* 456 So.2d 666 (La.App. 5 Cir.1984); *Cooper v. Olinde,* 565 So.2d 978 (La.App. 1 Cir. 1990).

In addition, our Supreme Court has stated:

> In expropriation proceedings, much discretion is granted to the trier of fact. The trial judge's factual determinations as to the value of property and severance damages, and his evaluation of and weight given to testimony of expert witnesses, will not be disturbed on

review in the absence of manifest error. *State, Dept. of Transp. & Dev. v. Stumpf,* 519 So.2d 279 (La.App. 5th Cir.), *writ denied,* 520 So.2d 753 (La.1988).

*State Through DOTD v. Estate of Davis,* 572 So.2d 39 (La.1990).

Therefore, we find no error in the determination by the trial court that plaintiffs' loss of property value was $55,000.00 based on the opinion of Mr. Eppling.

With regard to loss of profits, it is clear under *Dietrich,* supra, that the court had the authority to award damages for lost profits. Both parties object to the award made by the judge in this respect, relying on their respective expert's testimony and opinion to demonstrate error.

> The trial judge is not bound by expert testimony. He may substitute his own common sense and judgment for that of an expert witness where in the opinion of the trier of fact such substitution appears warranted by the testimony as a whole.
>
> *Williams,* supra.

Furthermore, expert opinions are not ordinarily conclusive and are generally regarded as advisory in nature. *State Dept. of Transp. & Dev. v. Stumpf,* 419 So.2d 279 (La.App. 5th Cir.1988), writ den. 520 So.2d 753 (La.1988).

As stated by Mr. Yrle in his report to the court: " . . . not all experts agree on how to arrive at the amount considered to be lost gross profit."

The court heard the testimony of Constance, as well as that of both economists, before determining that plaintiff did indeed suffer loss of business and profit due to

the construction. After reviewing the record, we do not find that such a determination was clearly wrong. Rather than experiencing a modest 3.6% increase in the fiscal year ending July, 1982, Cleary suffered a rather dramatic loss. While Cleary recovered somewhat from that in 1983, it was still below the earlier 1980 levels and obviously did not reach the projected 3.6% increase in 1983. The plaintiffs established with reasonable certainty that such an increase should have been experienced by Cleary (since that rate of growth was actually experienced by the less affluent St. Bernard store), and the most plausible explanation offered at trial was the confusion on the part of the customers caused by construction. Also, we do agree with the trial court that such losses should not extend beyond 1983, inasmuch as the testimony indicates strongly that the economy in general began to decline after that date.

Additionally, "Absent special circumstances, a property owner cannot retire for life from the taking of a business. A more reasonable time limit for future economic losses is necessary. *Dietrich*, supra.

We find that two years, as found by the learned trial court, is a reasonable time period in this case.

In determining the actual loss of profits, the jurisprudence holds that an award for such loss cannot be based upon speculation and conjecture; yet the trier of fact has much discretion in determining such damages where the evidence clearly shows the damage is proven but not to a mathematical or legal certainty. See *Jordan v. Travelers Insurance Company*, 245 So.2d 151 (La.1971); also *Rosenbloth v. Louisiana Bank & Trust*, 432 So.2d 285 (La.App. 2 Cir. 1983).

In the present case, the court found that the gross profit category most reliably represented the plaintiffs' economic status, and after examining the record we find no manifest error in such determination. Gross profit is the result of gross sales minus costs of sales. The court determined that the compensable loss suffered by plaintiffs was the difference between the actual gross profits and what the gross profits should have been using the 3.6% increase. That 3.6% figure is a reliable, even if conservative, indicator of lost profits in this particular case.

The court averaged the costs of sales for the years 1980-81, rather than using the costs shown by either expert, to set off the "artificial difference caused by the prepurchase of part of the inventory for 1982 in 1981." (Reasons for Judgment).

> Where there is a legal right to recovery but the damages cannot be exactly estimated, the courts have reasonable discretion to assess same based upon all the facts and circumstances of the case. . . . This latter principle is also applicable, where the fact of loss of earnings or earning power, past or future, is proved, but not any exact amount.
>
> *Jordan*, supra.

The facts of this case show that because there *was* a prepurchase of inventory in 1981 *prior* to construction, and that due to economic conditions set up by the construction, plaintiff was obliged to "live" on this inventory for quite some time. The decision of the judge to average those costs was reasonably within his or her discretion as discussed in *Jordan*, supra.

In fixing the losses, the court used figures for gross sales supplied by the defendant's economist, also a matter reasonably within his or her discretion. The calculations made by the trial judge were as follows:

| Taxable year ending | 7/31/81 | 7/31/82 | 7/31/83 |
|---|---|---|---|
| Gross Sales | $223,207.00 | $186,683.00 | $241,055.00 |
| Costs of Sales | $107,224.00 | $107,224.00 | $129,026.00 |
| Gross Profit | $115,983.00 | $79,459.00 | $112,029.00 |
| Projected 3.6% increase | | $120,158.00 | $124,483.00 |
| Loss of Profits | | ($ 40,699.00) | ($ 12,454.00) |

Based on the facts and the foregoing jurisprudence, we find that the award for loss of profits as calculated by the astute trial court was reasonably supported by the evidence, was within his or her discretion, and consequently we find no manifest error in that aspect of the judgment either.

Finally, with regard to attorney fees, LSA-R.S. 13:5111(A) states, in pertinent part:

> A court of Louisiana rendering a judgment for the plaintiff, in a proceeding brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them, for compensation for the taking of property by the defendant, other than through an expropriation proceeding, shall determine and award to the plaintiff, as a part of the costs of court, such sum as will, in the opinion of the court, compensate for reasonable attorney fees actually incurred because of such proceeding.

We stated in *Howard v. Louisiana Power & Light Co.*, 583 So.2d 503 (La.App. 5 Cir.1991), that the above statute

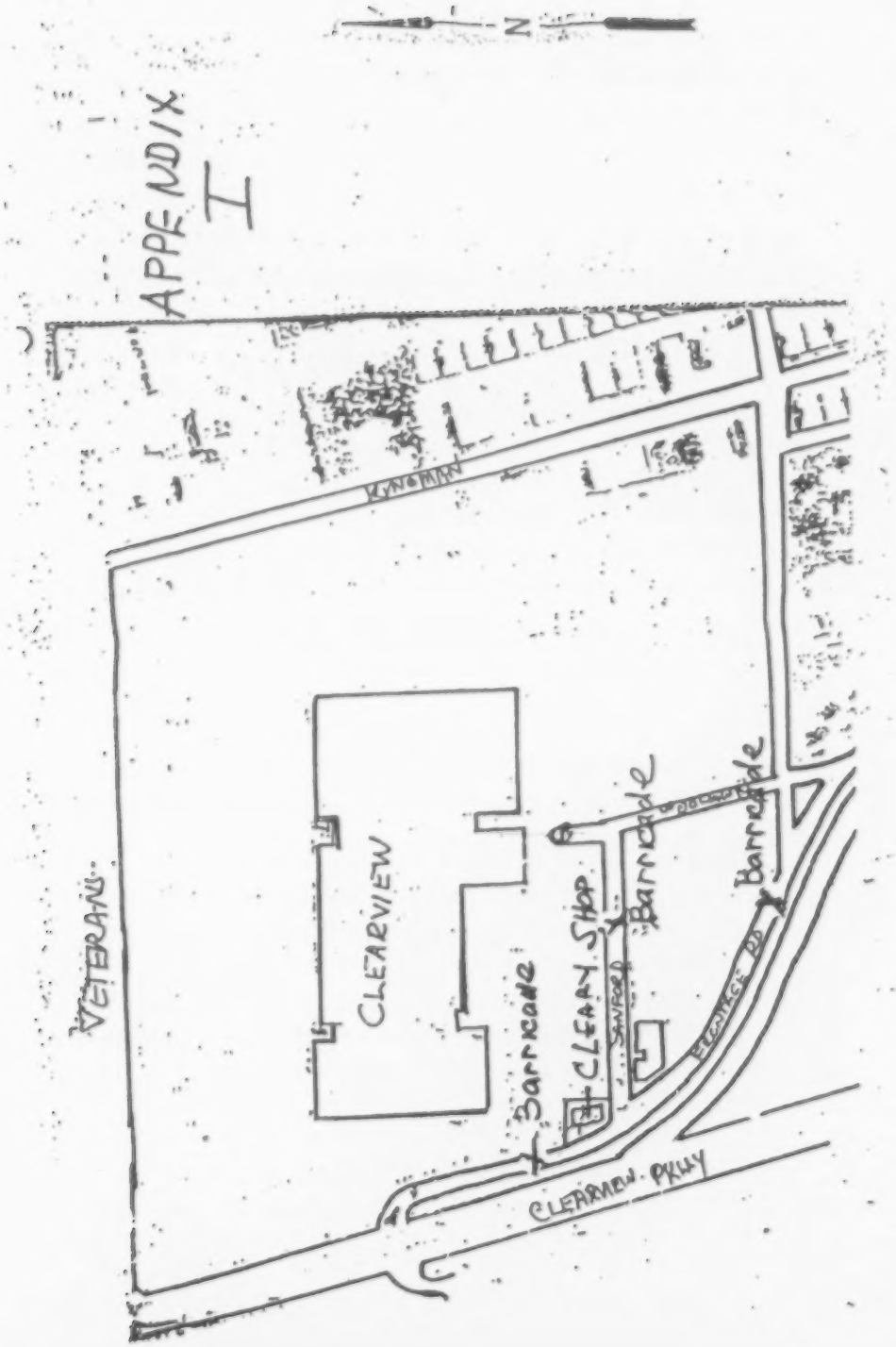
specifically authorizes an award for attorney fees where a governmental authority "takes" property by a method other than expropriation. "Taking" can occur from inverse condemnation. *Tassin*, supra; *Reymond*, supra. See also *Pillow v. Board of Commissioners*, 425 So.2d 1267 (La.App. 2 Cir.1982). Accordingly, we find that plaintiffs are entitled to an award for attorney fees in this proceeding and that the amount awarded was reasonable and proper under the circumstances of this case.

> Attorney fees in expropriation cases are discretionary with the trial court. A number of factors should be considered including the complexity of the case, the responsibility required of the attorney, his skill, knowledge and diligence, the result obtained and the work performed.
>
> *State, Through DOTD v. Davis*, supra.

## DECREE

For the foregoing reasons, the judgment of December 19, 1991 is affirmed in every respect.

**AFFIRMED**

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## APPENDIX G

(SEAL)

**SUPREME COURT**
STATE OF LOUISIANA
**NEW ORLEANS**

Chief Justice
Pascal F. Calogero, Jr.

Associate Justices
Walter P. Marcus, Jr.
James L. Dennis
Jack Crozier Watson
Harry T. Lemmon
Pike Hall, Jr.
Catherine D. Kimball
Revius O. Ortique, Jr.

301 Loyola Ave., 70112

Telephone 504-568-5707

Clerk of Court
Frans J. Labranche, Jr.

January 6, 1994

Jerome M. Volk, Jr.
DeMARTINI, LEBLANC ET AL
i33329 Florida Avenue
Kenner, LA 70065

Mark J. Armato, Esq.
DeMARTINI, LEBLANC ET AL
612 Hester Avenue
River Ridge, LA 70123

Re: CARROLL LEBLANC ET AL VS. STATE OF LOUISIANA ET AL No. 93-C-0813

Dear Counsel:

Enclosed please find a News Release documenting this court's denial of the application for rehearing, in the above entitled referenced case.

This judgment is now final. By copy of this letter we are advising both the trial court and appellate court of the

finality of this case and instructing them to do whatever is necessary to implement the judgment.

With kindest regards, I remain,

Very truly yours,

/s/ Frans J. Labranche, Jr.
Frans J. Labranche, Jr.
Clerk of Court

FJLJr:mlm
Enclosure
ccs: Hon. Jo Ellen Grant
Hon. Peter Fitzgerald
Hon. Jon Gegenheimer
Jesse S. Guillot, Esq.
Ronald J. Bertrand, Esq.

## APPENDIX H

## SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 003

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 6th day of January, 1994, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

* * *

REHEARINGS DENIED:

* * *

93-C - 0813 CARROLL LEBLANC, Wife of/and GERALD CONSTANCE AND CLEARY BICYCLE, MOPED & GO-CART CENTER, INC. v. STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, OFFICE OF HIGHWAYS, PEPPER & ASSOCIATES, INC. T. L. JAMES AND COMPANY, C.A. AND LOUISIANA PAVING, INC. (Parish of Jefferson)
WATSON, J. – not on panel.
ORTIQUE, J. – would grant a rehearing.

* * *

## APPENDIX I

## SUPREME COURT OF LOUISIANA

93-CA-0813

CARROLL LEBLANC, Wife of/and GERALD CONSTANCE AND CLEARY BICYCLE, MOPED & GO-CART CENTER, INC.

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, OFFICE OF HIGHWAYS, PEPPER & ASSOCIATES, INC., T.L. JAMES AND COMPANY, C.A. AND LOUISIANA PAVING, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, PARISH OF JEFFERSON, STATE OF LOUISIANA

### APPLICATION FOR REHEARING

The application of CARROLL LEBLANC, Wife of/ and GERALD CONSTANCE AND CLEARY BICYCLE, MOPED & GO-CART CENTER, INC., Plaintiffs/Respondents/Applicants, respectfully represent that the decision rendered on October 28, 1990 reversing: the judgment of the Twenty-Fourth Judicial District Court for the Parish of Jefferson; the judgment denying the Motion for a New Trial of the Twenty-Fourth Judicial District Court for the Parish of Jefferson; and the decision of the Court of Appeal, Fifth Circuit, is contrary to law and the evidence because:

The majority opinion of this Honorable Court is factually erroneous in its finding that only two (2) of the original approaches to the northwest quadrant of the Clearview interchange remain unchanged, and that the other two (2) approaches now require a more circuitous route. In fact, three (3) of the approaches to the northwest quadrant have been substantially altered following the actions by the State.

2.

The majority opinion of this Honorable Court is factually erroneous in stating that, "Russell Doyle, and [sic] engineer for the Department of Transportation and Development, asserted that traffic was never completely blocked . . . in accordance with the Department of Transportation and Development's general custom." When in fact, Mr. Doyle stated at TR p. 608, ll 1-8 that he didn't "remember".

3.

The majority opinion of this Honorable Court is factually erroneous in stating that the "engineers from the Highway Department actually solicited his [Constance] complaints and took action with regard to both the signing and the barricades". In fact, at TR pgs. 491 and 492, Applicant stated that although the engineers had met with him, the problem returned the very next day. Petitioner had a continual "war" of moving barricades, putting up his own signs and virtually "pushing" aside the impediments to his customer's flow, only to have the

problems resurface the following day, when the barricades would be back in place and his signs had been ripped down.

4.

The majority opinion is erroneous because it fails to acknowledge facts that customers are the life blood of any retail enterprise barricading and signing prohibiting customers from having access to the store deters the customer. The opinion also fails to acknowledge the continuing damage after the construction phase was completed. The decision's failure to address these issues demonstrates a lack of understanding for the realities and practicalities of business, which was present in the judgments of the lower courts, herein.

5.

The State presented absolutely no evidence of what damage adjoining or other neighboring landowners suffered. It is apparent that there were no other damaged property owners because the State would not have been so remiss, if other neighboring property owners had made claims, to not have offered evidence, thereof. Accordingly, the majority opinion of this Honorable Court assumes facts not in evidence, because it states other neighbors were similarly inconvenienced. However, the other property owners and businesses had access to their property. Petitioners are uniquely located, and the damage they suffered was singularly related to them.

6.

This Honorable Court erroneously reversed the judgments and decision of the lower courts, without establishing how the lower court in its original judgment, or the judgment denying a new trial by a different lower court Judge, or the decision of the Court of Appeal committed "manifest error." This action in the majority opinion of this Honorable Court is erroneous, when viewed in light or its own holding in *Rosell v. ESCO*, 549 So.2d 840 (La. 1989).

7.

The majority opinion of this Honorable Court is erroneous, because it does not address the relationship of the continual decline is [sic] gross profit and the diminution in value of the real estate as an indication of the denial of access from a distant point and the damages created, thereby. The lower courts utilized a three part approach to show damages arising out of this substantial denial of access. The criteria involved: damages to property, loss of profit during the construction phase, and damage to profits following the construction phase.

8.

The majority opinion of this Honorable Court was erroneous, because it fosters a principle of law concerning the utilization of an inappropriate test. The Court appears to require proof of, either "physical damage" or "excessive or abusive conduct by the DOTD", in order to

recover under Civil Code Articles 667 and 668. This burden of proof is inappropriate, when it is compared to the burden of proof for recovery required between ordinary, citizen-neighbors under this Court's decision in *Butler v. Baber,* 529 So.2d 374 (La. 1988).

9.

The dichotomous and irreconcilable burden of proof required by the decision of the majority of this Honorable Court is in opposition to that established in *Butler,* supra. The principle enunciated, herein, creates an unequal relationship in violation of the "equal protection guarantees" of both the United States Constitution and that of the State of Louisiana. (LSA-Const. Art. I, § 3 and 22) The majority opinion's requirement that the State's action must "rise to the level of excessive or abusive conduct", before there can be recovery is directly contrary to the formula clearly stated by this Court in *Butler,* supra, at pg. 381. *Butler,* requires "only that damage and causation be proved."

10.

The majority opinion erroneously relies upon, *State, through The Department of Transportation and Development v. Chambers Investment Co., Inc.,* 595 So.2d 598, 604 (La. 1992), which contained an erroneous discussion of Professor Yiannopoulos. In *Chambers,* that Court quoting the Professor's work indicated that "No case has been found in which a landowner . . . was held liable under Article 667 for non-neglect acts and activities that were not ultra-hazardous." That quote is from the Treatise that precedes

the *Butler* case, and it is wrong following that decision. The *Chambers* case then went on to say that "we are not prepared to say that, in all cases, a landowner must prove an abuse of right of ownership before he may suppress or recover for a violation of Article 667 by a neighbor." Therefore, this Court should not utilize the "abusive, excessive" test, it has enunicated [sic] out in this case.

11.

The legal fiction and burden of proof erroneously established in the majority opinion contravenes the spirit enunciated by this Court in its decision in *Chamberlain v. State of Louisiana,* 1993 WL 335290, which was rendered on September 3, 1993. In that case, this Court re-visited its own decision in *Board of Commissioner's of Port of New Orleans v. Splendour Shipping and Enterprise Co.,* 273 So.2d 19 (La. 1973), and opined that governmental immunity was "out moded" and inconsistent with requiring the "state agencies either act responsibly, or be subject to answer in Court." The opinion in the instant case allows the state to be sanctioned only if its actions are "excessive or abusive" while ordinary citizens need only proof [sic] "damage and causation" to recover against their neighbors.

12.

The majority opinion of this Honorable Court is somewhat confusing, curious and not very illuminating in view of the questions posed by the Court to the State of Louisiana, during oral arguments. The Court queried the State's attorney concerning "what new points, it had

to present", when one Justice was seeking corroboration for the Court's granting of the State's Writ Application. The State's [sic] responded that it had no new issues or facts. The State suggested that there was other litigation that may be pending in the lower courts, and, at least, one of the members of this Court's panel appeared aggravated with the response.

13.

The majority opinion of this Honorable Court is erroneous in its reliance upon *Reymond v. State, through The Department of Highways*, 255 La. 425, 231 So.2d 375 (1970); *Ramelli v. City of New Orleans*, 233 La. 291, 96 So.2d 572 (1957), for the basis of its opinion, because those cases are factually distinguishable from the case herein. In fact, other decisions of this Court are more closely related, factually, but they were not cited, by the majority opinion, i.e., *Cerniglia v. City of New Orleans*, 234 La. 730, 101 So.2d 218 (1958) and *State of Louisiana v. Stickland*, 290 So.2d 714 (La. App. 1st Cir. 1974) writ denied 295 So.2d 177 (1974) in which the Supreme Court stated its reason, that there was "no error of law in the Judgment of the Court of Appeal.

14.

The majority opinion of this Honorable Court cites a reliance upon the principles of *State, through The Department of Transportation and Development v. Chambers Investment Co., Inc.*, 595 So.2d 598, (La. 1992) and the Treatise by William B. Stoebuck, *Nontrespassory Takings in Eminent*

*Domain* (1977). Petitioners submit the true spirit embodied in the *Chambers* case and in the Stoebuck Treatise, attempts to pursue the idea that "the overall direction continues to be one in which rights of private property enjoy increasing protection against governmental activity," and the concept of "taking without touching". (Stoebuck's Preface and p. 21) However, the opinion seems to be sounding a retreat from the enlightened position espoused in *Chambers* and the Stoebuck work.

15.

That the majority opinion of this Honorable Court violates the protections enunciated by the Fifth Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment, and the Louisiana Constitution Art. I § 2 and 4. The majority opinion serves as the first instance wherein this has acted as a deprivation of "property without due process of law" because of the way in which the law of Eminent Domain and Inverse Condemnation has been administered unequally due to the favorable burden of proof granted to the State. The impact of the decision provides a reward for the State action, instead of sanctioning it.

16.

The majority opinion of this Honorable Court is erroneous in that it fails to encompass the expanding scope of "loss" envisioned by Art. I § 4 of the Louisiana Constitution of 1974, because it narrowly interprets the current situation in a fashion that reminds one of the "just and adequate compensation" premise of years-gone-by. The

opinion appears to dispel the concept that, "the action for inverse condemnation is available in all cases where there has been a taking or damaging of property without regard to whether the property is corpored [sic] or incorporeal", *Chambers,* supra, p. 602.

17.

This case has the power and the ability to reverse its decision on an Application for Rehearing. This was demonstrated in *Vervick vs. State, Department of Highways,* 302 So.2d 895, (La. 1974) *Callais v. Allstate Insurance Co.,* 334 So.2d 692 (La. 1975).

18.

For the reasons states [sic] above, and as previously disclosed to this Honorable Court, and as will be amplified by the brief which will be filed, as set out below, a rehearing should be granted.

APPLICATION FOR EXTENSION OF TIME FOR THE FILING OF A BRIEF IN SUPPORT OF THIS APPLICATION FOR REHEARING

19.

Petitioners respectfully request this Honorable Court for further time for filing of a brief in support of their Application for Rehearing, in accordance with Rule IX, Section 3 of the Supreme Court Rules.

20.

Petitioners allege that the issues presented by this Court's opinion raise significant legal points, not heretofore addressed, and Justice James L. Dennis' Concurring Opinion has not yet been received, by undersigned counsel.

21.

Petitioners request that this Court grant them leave of court until 15 days after the mailing of Justice Dennis' concurring opinion within which to file their brief in support of this Application for Rehearing.

Wherefore, Petitioners pray that a rehearing be granted and that:

1. The judgment previously rendered by this Court be set aside.

2. That Judgment be entered in favor of Petitioners and that the decision and judgment of the lower courts be affirmed and reinstated.

3. Petitioners be granted and [sic] extension of time and within which to file their brief in support of the Application for Rehearing as set out, hereinabove.

4. And for all other relief available.

Respectfully Submitted:
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ORDER

Considering the foregoing Application for Extension of Time;

IT IS HEREBY ORDERED that:

1. That Petitioners be granted and [sic] extension of time and within which to file their brief in support of the Application for Rehearing, until fifteen (15) days after the mailing of Justice James L. Dennis' Concurring Opinion.

New Orleans,, Louisiana, this ___ day of ___, 1993.

_____
JUDGE

Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

No. 93-1582

In The

# Supreme Court of the United States

October Term, 1993

CARROLL LEBLANC, wife of/and
GERALD CONSTANCE AND CLEARY BICYCLE,
MOPED & GO-CART CENTER, INC.,

*Petitioners,*

v.

STATE OF LOUISIANA, THROUGH THE DEPARTMENT
OF TRANSPORTATION AND DEVELOPMENT,

*Respondent.*

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Louisiana**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I.

Did the roadway redesign and construction activities of the Louisiana Department of Transportation and Development constitute a "Taking" of private property for public use without compensaton as forbidden under U.S. Constitution, Amendment V?

II.

Have applicants been denied "equal protection" under the law by the decision of the Louisiana Supreme Court?

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## STATEMENT OF THE CASE

This matter involves an inverse condemnation claim by petitioners for alleged business losses and reduction in value to their property arising out of the State's redesign of traffic routes at the Clearview Parkway/Interstate 10 Interchange in the metropolitan New Orleans area and the construction which accomplished that purpose. The entire project was less than ½ mile in length and was accomplished entirely within the State's existing right of way. The construction began September 1, 1981 and the project was completed on March 23, 1982. A formal acceptance was filed by the State in the Office of the Clerk of Court by letter dated April 8, 1982. Thus the entire construction period lasted only 7 months.

Prior to and during construction, petitioners operated a retail establishment known as Cleary Bicycle, Moped and Go-Cart Center, which was located at the intersection of the I-10 Service Road and Sanford Street. Since the construction was accomplished entirely within the State's existing right of way, there was no need to expropriate any property from the petitioners. There was no physical utilization of any of petitioners' property during construction. Petitioners contend that the 7 months of construction interrupted their business by making the store less accessible and that the methods of getting to the store after construction have changed; yet during and after construction, the store was always open for business and ingress and egress to the business premises was always available.

There are many allegations in the Statement of the Case contained in petitioners' writ application that are

exaggerated or are quotations taken from the opinion of the State Appellate Court which were subsequently rejected by the Louisiana Supreme Court. It should be noted that there are no quotes from the Louisiana Supreme Court opinion which reversed the lower courts in applicants' Statement of the Case. The first such exaggeration is found on page 4 of the petition wherein applicant states that the construction created a "walled off, island existence. Petitioners were stranded from the life line of their blood, i.e., customers." Similarly, on page 7 of the petition we find the statement that "when the State started its project, each and every method of getting to petitioners' building and business was blocked." And on page 9 of the petition, applicants would have this Court believe that following the completion of construction, "only one of those methods of approach remains following the redesign." It is suggested that this Court need only refer to the decision of the Supreme Court of Louisiana in this matter, which is attached as Appendix A to the Petition for Writ of Certiorari, for a correct and impartial statement of facts. The Supreme Court clearly recognized that Cleary Bicycle suffered some inconvenience during construction, but that customers were able to have access to the store and that there is plenty of access from various directions remaining after the construction and redesign in this area. It should be noted that this store was on a frontage road in a heavily travelled interchange even before the redesign and access was always somewhat circuitous. The most relevant facts for the purpose of argument to this Court are: 1) there was no property expropriated from petitioners; 2) there was no physical utilization of petitioners' property during construction; 3)

petitioners were able to continue to operate as a retail store continuously during construction; 4) customers were able to get to them continuously during construction; 5) the store continues to operate as a retail store after the completion of construction; 6) the State exercised no control over petitioners' property or the business conducted thereon before, during or after construction; and, 7) the property continued to be utilized in the same manner during and after construction as it did before, namely as a retail operation known as Cleary Bicycle, Moped and Go-Cart Center.

## SUMMARY OF ARGUMENT

In this inverse condemnation case, petitioners allege that the denial of recovery by the Louisiana Supreme Court constitutes a denial of their rights under Amendment V to the U.S. Constitution. In order to recover under the Fifth Amendment for damages to property when there has been no formal expropriation or physical invasion of the property, this Court has recently held that the governmental action complained of must result in the denial of all economically beneficial or productive use of the property to the landowners. This Court has further held that even if such governmental regulation denies all economically beneficial or productive use, the landowner may still not recover if the action complained of was a legitimate exercise of the police power of the governmental entity which pre-existed the landowner's ownership of the property.

In this case, the governmental activity complained of was the redesign of traffic patterns and traffic flows and the construction activities necessary to accomplish that redesign. The activities were conducted solely within the confines of existing right of way owned by the Louisiana Department of Transportation & Development. There was no formal expropriation from the petitioners and there was no physical invasion of their property. During the period of construction and thereafter, the petitioners enjoyed access to abutting streets from their property and continued to utilize the property in the conduct of their retail business throughout. There has, therefore, been no taking of their property under Amendment V to the U.S. Constitution.

Alternatively, petitioners argue that the Louisiana Supreme Court has applied a different standard to the Louisiana Department of Transportation & Development in this case than it did to private landowners in another case. The other case referred to, however, did not involve any federal questions nor any constitutional issues under the U.S. Constitution or the Louisiana Constitution. The argument was raised before the Louisiana Supreme Court and rejected by that Court. Since no federal question is raised by this additional argument, it does not merit this Court's consideration. Even if it did, the two cases do not reach opposite results because of the application of different law, but because different facts were involved. Petitioners have been afforded full due process of law and have been treated equally by the courts. There is no basis for the granting of this writ application by this Court.

## ARGUMENT

Since no formal expropriation took place in this matter, petitioners' theory of recovery in the Louisiana courts was that the design and construction activities of the Louisiana Department of Transportation & Development amounted to an inverse condemnation which had damaged the value of their property and caused them to suffer business losses. The Louisiana courts have for many years recognized the right to recovery in appropriate circumstances for an inverse condemnation for taking or damaging of property other than by formal expropriation proceedings under Article 1, Section 4 of the Louisiana Constitution of 1974, as well as under its predecessor.[1] In the instant case[2], the Louisiana Supreme Court again recognized the existence of an inverse condemnation right of action under the Louisiana Constitution of 1974. In the copy of the opinion attached as Appendix A to the petition filed herein, it can be seen that the Louisiana Supreme Court went to great lengths to reconfirm the availability of the remedy and the conditions which must exist for damages to be recovered for an inverse condemnation. The Court made it clear that recovery will not be allowed in every situation in which damages occur, but only in those situations in which the State has caused physical damage to property or where the State's activity is deemed to have been excessive or abusive. Having found neither physical damage to petitioners' property nor excessive or abusive conduct on behalf of DOTD, the Louisiana Supreme Court found that

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[1] *Reymond v. State, Dept. of Hwys.*, 231 So. 2d 375 (La. 1970).

[2] *Constance v. State of La., DOTD*, 626 So. 2d 1151 (La. 1993).

petitioners were not entitled to recover any damages they may have sustained.

In an application for rehearing to the Louisiana Supreme Court and in its writ application to this Court, petitioners now contend that the guidelines set forth by the Louisiana Supreme Court for recovery in inverse condemnation situations is contrary to rights set out under Amendment V to the United States Constitution. Alternatively, petitioners contend that the holding of the Louisiana Supreme Court has denied them equal protection under the law.

## ARE PETITIONERS ENTITLED TO RECOVERY UNDER AMENDMENT V TO THE U.S. CONSTITUTION?

This Honorable Court recently re-examined what governmental activities would constitute a "taking" other than the actual formal expropriation of property.[3] While the *Lucas* case dealt with regulatory takings, the rationale should be the same for other governmental activities, such as construction, which indirectly impact landowners. In *Lucas* this Court again repeated that it has avoided any set formula for determining when a governmental regulation or activity has gone too far, but recognized the two basic categories that have triggered the awarding of compensation in these situations.

---

[3] *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

> "We have, however, described at least two discrete categories of regulatory action as compensable without case specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical invasion of his property. In general, at least with regard to permanent invasions, no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas,* supra at p. 2893.

> "The second situation in which we have found the categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land . . . As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land'." *Lucas,* supra at p. 2893.

In the instant case, there was no "physical invasion" of petitioners' property. Thus, there has been no taking under the first category referred to above. Neither has there been a taking under the second situation described above. The State of Louisiana had a legitimate state interest in the redesign of the intersection to promote public safety. Furthermore, neither this redesign of the intersection for public safety purposes nor the construction to accomplish those purposes denied the petitioners economically viable use of their land. As stated previously and as acknowledged by the Louisiana Supreme Court, these landowners continued to utilize their land during

and after construction for the same purpose and in the same manner as they did prior to the redesign and construction. While petitioners may decry the test applied by the Louisiana Supreme Court of "abusive or excessive conduct" in the absence of physical damage by the State, that standard is surely no more harsh than the requirement imposed by this Court that the governmental actions must result in a total loss of use of the property. Regardless of whether or not the standard applied by the Louisiana Supreme Court may in some other particular instance abridge the right to compensation of a landowner under the Fifth Amendment to the United States Constitution, it is obvious under the facts of *this* situation that the holding of the Louisiana Supreme Court is not in conflict with the holding of this Court in *Lucas* and other similar cases.

Furthermore, the actions of the State in redesigning traffic flow and traffic patterns while still maintaining access from the property to an abutting roadway was a legitimate exercise of the police power of the State which existed long before petitioners herein acquired title to their property. This was clearly recognized and set out by the Louisiana Supreme Court in its decision herein:

> "Furthermore, it has long been recognized that a public body has the right, under its police power, to divert traffic without subjecting itself to liability. *Ramelli v. City of New Orleans*, 233 La. 291, 96 So. 2d 572, 574 (1957). While recognizing that commercial property owners were inconvenienced by the narrowing of a major traffic artery to construct an overpass and by the diversion of traffic some 3000 feet, the Ramelli court noted that the inconvenience was common to all

> property owners within the same vicinity. Accordingly, the court affirmed the ruling of the trial court that the plaintiff's had sustained a loss without an injury in the legal sense. Similarly, other jurisdictions have concluded that a property owner has no protectible interest in such traffic flow, as opposed to access." *Constance v. State*, supra at p. 1156. Emphasis added.

This Court recognized in *Lucas*, as it had on prior occasions, that the State's use of these pre-existing police powers does not give rise to compensation.

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our takings jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the bundle of rights that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the state in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Lucas*, supra at p. 2899.

The petitioners in this case cannot even approach the threshold for compensation set by this Court in *Lucas*. While they may have sustained some inconvenience for 7 months, that inconvenience was caused by a legitimate application of the police power enjoyed by the State over

its own right of way; furthermore, they continued to enjoy the full use of their property during and after construction despite this inconvenience.

## HAVE APPLICANTS BEEN DENIED EQUAL PROTECTION UNDER THE LAW BY THE DECISION OF THE LOUISIANA SUPREME COURT?

In this alternative argument, petitioners complain that the Louisiana Supreme Court in this case did not apply the same standard to the State as it did to private individuals in its decision in *Butler v. Baber,* 529 So. 2d 374 (La. 1988). Petitioners argue that these differing standards applied by the Louisiana Supreme Court have deprived it of equal protection under the law.

Petitioners' greatest failure in this argument is the failure to point out what federal laws or statutes have been unequally applied so that this Court would have an interest. It has already been demonstrated in the foregoing section that petitioners' rights under the Fifth Amendment to the U.S. Constitution have certainly not been violated. Petitioners have certainly had access to the Courts to pursue their claims and they have been afforded due process under the law.

The statutes involved in the *Butler v. Baber* case decided by the Louisiana Supreme Court were Louisiana statutes. There were no issues involving either the Louisiana Constitution or the U.S. Constitution in the *Butler v. Baber* case. Thus, petitioners' argument amounts to a complaint that the Louisiana Supreme Court failed to follow its own ruling in *Butler v. Baber* in deciding this case. That

argument was rejected by the Louisiana Supreme Court after full consideration. This Court need not even consider the argument because it raises no federal question.

Even if the argument raised a question deserving of this Court's consideration, the argument itself is without merit. In *Butler v. Baber,* monetary damages were awarded to a lessee of oyster beds because dredging activities conducted nearby had *physically* disturbed the beds. The dredging had caused mud to cover the oyster beds, thereby blackening and suffocating the oysters. Thus, there was a physical invasion and damage to the property covered by the oyster lease.

In this case, the Louisiana Supreme Court made it obvious that damages can be awarded for inverse condemnation if there is personal injury or physical damage to property and the requirement of some type of excessive or abusive conduct is only necessary where there is no such evidence of personal injury or physical damage to property:

> "The liability of a public body in such case, however, has been limited to those instances where there is a *physical taking or damage to property* or a special damage peculiar to the particular property and not general damage sustained by other properties similarly located." *Constance v. State,* supra at p. 1156. Emphasis added.
>
> "But, *in the absence of* a taking *or physical damage,* general damage sustained by property as a consequence of public improvement, such as some degree of inconvenience, must be suffered and

> endured by owners of separate tracts for the benefit of the general public." *Constance v. State,* supra at p. 1156. Emphasis added.
>
> "The Chambers court concluded that, *where there is no allegation or evidence of personal injury or physical damage to property,* a finding of liability under Article 667 requires proof of the presence of some type of excessive or abusive conduct." *Constance v. State,* supra at. p. 1157. Emphasis added.
>
> "There is proof *neither of physical damage to property* nor excessive or abusive conduct by the DOTD." *Constance v. State,* supra at p. 1157. Emphasis added.

It is obvious from the above that had there been physical damage in this case as there was in *Butler v. Baber,* there would have been recovery for such physical damage. The results of these two cases, therefore, do not contradict one another and petitioners have not been denied equal protection under the law by the holding of the Louisiana Supreme Court herein.

## CONCLUSION

There is no merit to either argument raised by petitioners herein. Respondent urges this Court to reject their petition for a writ.

Respectfully submitted,

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